Nos. 16-3162 and 16-3271

U.S. Court of Appeals for the Seventh Circuit

HOBBY LOBBY STORES, INC.,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner,

and

COMMITTEE TO PRESERVE THE
RELIGIOUS RIGHT TO ORGANIZE,
Intervening Respondent.

ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, NO. 20-CA-139745

BRIEF OF PETITIONER / CROSS-RESPONDENT HOBBY LOBBY STORES, INC.

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DISCLOSURE STATEMENT

(1) The full name of every party that the attorneys represent in the case (if the party is a Corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3);

Hobby Lobby Stores, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court:

Ogletree, Deakins, Nash, Smoak & Stewart P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A.

s/Ron Chapman, Jr.

s/Christopher C. Murray

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under 29 U.S.C. § 160(f) because Hobby Lobby Stores, Inc., ("Hobby Lobby") is aggrieved by a final order of the National Labor Relations Board ("NLRB" or "Board"). The Board issued its Decision and Order in *Hobby Lobby Stores, Inc.*, Case 20-CA-139745, 363 NLRB No. 195 on May 18, 2016 (the "Order"). Hobby Lobby timely filed a petition for review on May 20, 2016, in the Fifth Circuit Court of Appeals. *See Hobby Lobby Stores, Inc. v. NLRB*, Case No. 16-60312 (5th Cir.). The Fifth Circuit transferred Hobby Lobby's petition to this Court on August 12, 2016. The Board filed its Cross-Application for Enforcement on August 25, 2016.

ISSUES PRESENTED

1. In concluding Hobby Lobby's Mutual Arbitration Agreement ("MAA") violates the National Labor Relations Act ("NLRA"), the Board relied on its decisions in *D.R. Horton, Inc.*, 357 NLRB 2257 (2012) ("*Horton I*"), *enf. denied in relevant part*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) ("*Horton II")* and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) ("*Murphy Oil I*"), *enf. denied in relevant part*, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) ("*Murphy*

Oil II"). The Board's rationale differs from the reasoning of this Court's decision in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016). This Court is limited under the *Chenery* doctrine to reviewing the Board's rationale. Must the Court review the Board's reasoning in *D.R. Horton I* without substituting its own reasoning from *Lewis* and deny enforcement of the Board's Order because that reasoning is wrong?

2. The Board's authority is limited to the NLRA, which does not govern adjudicative procedures. Did the Board exceed its authority by purporting as a matter of federal labor policy to grant NLRA-covered employees a substantive right to invoke class action, collective action, and joinder procedures (collectively, "class procedures") created by other laws?

3. The Federal Arbitration Act ("FAA") mandates arbitration agreements be enforced according to their terms subject to certain exceptions. The Board has no authority to interpret the FAA. Did the Board err in holding Hobby Lobby's MAA unlawful and unenforceable despite the FAA because the MAA waives class procedures?

4. The record contains no evidence the MAA has inhibited any Hobby Lobby employee from filing a charge with the Board. The Court

may uphold the Board's findings only if supported by substantial evidence in the record. Must the Court refuse to enforce the Board's order because there is no substantial evidence Hobby Lobby violated the NLRA?

STATEMENT OF THE CASE

I. Hobby Lobby's Mutual Arbitration Agreement

Hobby Lobby is a national retailer of arts, crafts, hobby supplies, home accents, holiday, and seasonal products, operating approximately 660 stores in 47 states at the time this case was litigated. JA.238. Hobby Lobby is a party to a "Mutual Arbitration Agreement" ("MAA") with its applicants and employees (the "MAA"). JA.239-41. All Hobby Lobby employees must sign the MAA as a condition of employment. JA.239.

The MAA provides the "Employee" and the "Company" agree to submit certain employment-related claims ("Disputes") to final and binding arbitration in lieu of filing a lawsuit in court. JA.108-09, 168-69. By entering into the MAA, the Employee and the Company agree they "are giving up any right they might have at any point to sue each other." JA.109, 169.

The MAA provides the Employee and the Company will be the only parties to the arbitration of a Dispute under the MAA:

> The parties agree that all Disputes contemplated in this Agreement shall be arbitrated with Employee and Company as the only parties to the arbitration, and that no Dispute contemplated in this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party.

JA.108, 168.

The MAA also affirms it does not waive the Employee's right to file claims with governmental agencies (such as the NLRB):

> By agreeing to arbitrate all Disputes, Employee and Company understand that they ***are not giving up any substantive rights under federal, state or municipal law (including the right to file claims with federal, state or municipal government agencies).*** Rather, Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court.

JA.108, 168 (emphasis added).

Applicants for employment with Respondent must sign a copy of the MAA that contains substantially the same provisions as those in the MAA with employees. JA.241.

II. Federal courts' repeated enforcement of the MAA

On December 3, 2013, Hobby Lobby moved the United States District Court for the Eastern District of California to dismiss, or

alternatively to compel arbitration of, a former employee's individual and representative wage-related claims under California law. *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.) ("*Ortiz*"). JA.241.

On April 17, 2014, Hobby Lobby moved to dismiss a putative class action lawsuit alleging wage and hour claims under California law. *See Jeremy Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVS-AN (C.D. Cal.) ("*Fardig*"). JA.214. Pursuant to the FAA, Hobby Lobby moved to compel individual arbitration under the MAAs of each of the named plaintiffs. *Id.*

On June 13, 2014, the *Fardig* court granted Hobby Lobby's motion to compel individual arbitration. *Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014). The court rejected the argument the MAA was unenforceable under *Horton I*.

> The Court concludes that following the NLRB's reasoning on this issue would conflict with the [Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*,] and the Supreme Court's decision in *Concepcion* strongly favoring enforcement of arbitration agreements and strongly against striking class waiver provisions.

Id. at *7 (internal citations omitted). On October 1, 2014, the *Ortiz* court similarly granted Hobby Lobby's motion to compel, rejecting the

attempt to challenge the MAA as violating the NLRA. *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1077-1083 (E.D. Cal. 2014).

III. The Board's decision

The Charging Party filed the underlying unfair labor practice charge (the "Charge") against Hobby Lobby on October 28, 2014, challenging Hobby Lobby's MAA on various grounds. JA.236. On September 8, 2015, the ALJ issued her decision based on a stipulated record and found, under *Horton I* and *Murphy Oil I*, that Hobby Lobby violated the NLRA. JA.236, 242-44, 254-55. Hobby Lobby timely filed exceptions with the Board. JA.277. On May 18, 2016, the two-member majority of a Board panel issued its Order affirming the ALJ's decision in large part. JA.277-79.[1] Member Miscimarra dissented. JA.277-81.

The Board ordered Hobby Lobby to engage in various remedial actions, including reimbursing Ortiz, Fardig, and any other plaintiffs in *Ortiz* and *Fardig* for reasonable attorneys' fees and litigation expenses in opposing Hobby Lobby's motions to dismiss the collective lawsuits and compel arbitration, notwithstanding the fact that Hobby Lobby ***prevailed*** on both motions. JA.278.

[1] The Board did not rely on certain of the ALJ's findings that went beyond *Horton I*. JA.277 n.3.

SUMMARY OF THE ARGUMENT

In *Horton I*, the Board ruled – in conflict with the FAA – that the NLRA bars class action waivers in mandatory arbitration agreements. The Board based this extraordinary conclusion on an extraordinary premise: the NLRA grants employees a substantive right to access class procedures. The Board's attempt to locate this previously unknown "right" in the NLRA and its decision are wrong for at least five reasons.

First, the Board conflates employees' concerted ***assertion*** of alleged legal rights with courts' and arbitrators' collective ***adjudication*** of legal claims. The NLRA protects employees who assert their rights concertedly. The adjudication of legal claims, however, is governed by federal, state, and local rules of procedure or parties' arbitration agreements. The overwhelming majority of courts, including the Supreme Court, have concluded litigants do not possess substantive rights to procedures to obtain a collective adjudication of their claims and such procedures may be waived. Prior to *Horton I*, neither the Board nor any court had ever held employees possess a substantive right under the NLRA to those procedures.

Second, the Board has no authority to grant employees a substantive right to class procedures. The NLRA does not delegate to the Board the power to regulate procedures ***other*** decision-makers use to adjudicate legal claims under ***other*** statutes. The Board's attempt to do so conflicts with law outside the Board's jurisdiction and expertise, including the FLSA and the Federal Rules of Civil Procedure ("Federal Rules"). The Board's interpretation of Rule 23 as creating procedures to which employees have a substantive right under the NLRA also violates the Rules Enabling Act, which prohibits allowing the Federal Rules to enlarge or modify substantive rights.

Third, even if the Board had authority under the NLRA to determine what procedures must be available to employees in adjudicating their rights in other forums and under other laws, the Board has failed to balance the policies underlying the NLRA and FAA. The Board overestimates the role class procedures play in furthering the NLRA's purpose and ignores the policies behind the FAA favoring the enforcement of arbitration agreements.

Fourth, there is no evidence Ortiz ever engaged in any concerted activity with any other employee for their mutual aid or protection.

Fifth, the Board's award of attorneys' fees and expenses against Hobby Lobby for successfully moving federal courts to enforce the MAA violates Hobby Lobby's First Amendment right to petition.

ARGUMENT

I. Standard of Review

A. This Court may not defer to the Board's decision because it interprets law other than the NLRA and is an impermissible construction of the NLRA.

"[C]ourts do not defer to the Board when it decides a legal question beyond its expertise." *Roundy's Inc. v. NLRB*, 674 F.3d 638, 646 (7th Cir. 2012) (citation omitted). This Court reviews *de novo* the Board's interpretation of law outside the NLRA, including other federal statutes and contracts. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202-03 (1991); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) (not deferring to the Board's interpretation of the Bankruptcy Code); *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1028 (7th Cir. 1990) ("We owe the Board no special deference in matters of contractual interpretation.").

Courts also may not defer to the Board's interpretations of the NLRA that are not rational and consistent with the Act. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576 (1994). The

Board's constructions of the NLRA must be reasonable and permissible. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). Although the Board may balance conflicting interests in formulating national labor policy, *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 499 (1960), courts must ensure the Board's remedial preferences do not "potentially trench upon federal statutes and policies unrelated to the NLRA," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). "[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Courts must decline to defer to the Board's interpretations where they attempt to usurp "major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). *See also Ins. Agents' Int'l Union,* 361 U.S. at 499 ("[T]he Board's resolution of the issues here amounted . . . to a movement into a new area of regulation which Congress had not committed to it."); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) ("Deference to the Board 'cannot be allowed to slip

into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'").

In determining the degree of deference owed, courts also "consider the consistency with which an agency interpretation has been applied." *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 124 n.20 (1987). An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" that receives no deference. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016). *See also NLRB v. Bell Aerospace Co. Div. of Textron,* 416 U.S. 267, 289 (1974) (rejecting Board's new interpretation of the NLRA).

This Court may not uphold the Board's findings of fact that are unsupported by "substantial evidence in the record as a whole." *United Elec., Radio & Mach. Workers of Am. (UE) v. NLRB*, 580 F.3d 560, 563 (7th Cir. 2009) (citations omitted). *See also NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 782 (1979).

B. This Court must review the Board's reasoning and not substitute its own.

In reviewing the decision of an administrative agency such as the NLRB, it is "the foundational principle of administrative law that a

court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. E.P.A.*, _ U.S. _, 135 S. Ct. 2699, 2710 (2015). Under the *Chenery* doctrine:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. ***If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.***

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (emphasis added); *see also Caterpillar Logistics Servs., Inc. v. Solis*, 674 F.3d 705, 709 (7th Cir. 2012) ("[T]he judiciary . . . must affirm, or not, based on the agency's rationale."); *Spiva v. Astrue*, 628 F.3d 346, 353 (7th Cir. 2010) (noting an agency has the responsibility to "articulate reasoned grounds of decision based on legislative policy and administrative regulation"); *Moab v. Gonzales*, 500 F.3d 656, 659 (7th Cir. 2007) ("[W]e may uphold the [agency's] determination . . . 'if at all, on the same basis articulated in the order by the agency itself.'" (citation omitted)); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 322 (7th Cir. 1995); *NLRB v. Indianapolis Mack Sales & Serv., Inc.*, 802 F.2d 280, 285 (7th Cir. 1986).

Here, the Board applied its decisions in *Horton I* and *Murphy Oil I* without supplying independent reasoning. JA.277. Therefore, this Court must review the reasoning articulated by the Board in *Horton I* and reaffirmed in *Murphy Oil I* without substituting its own reasoned grounds. In particular, this Court must review the Board's decision without substituting the reasoning of this Court's decision in *Lewis*, 823 F.3d 1147, which was in a different procedural posture. In *Lewis*, the defendant/employer appealed from a district court order refusing to enforce an employment arbitration agreement that contained a waiver of class procedures. Here, Hobby Lobby petitions for direct review of a Board decision. Significantly, this Court, in concluding the agreement at issue in *Lewis* was unenforceable, did not incorporate or repeat the Board's reasoning in *Horton I* and its progeny. *Id.* at 1151. Rather, the *Lewis* Court engaged in an independent analysis of the text, history, and purpose of the NLRA and FAA.

The reasoning of *Lewis* and *Horton I* (and thus the Board decision here) differ substantially. *See* 823 F.3d at 1151-56. The most significant difference between *Lewis* and *Horton I* is *Lewis*'s conclusion that

Section 7 ***unambiguously*** covers "collective lawsuits."[2] ***Under* Lewis*'s* *rationale, the Board lacks authority to hold otherwise.*** *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see, e.g.*, *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992). The Board, on the other hand, assumed it had authority to construe Section 7 to cover access to class procedures as a matter of federal labor policy. *See* 357 NLRB at 2284, 2287-88.[3] In addition, unlike the Board in *Horton I*, the *Lewis* Court:

- Analyzed Section 7's text using dictionary definitions of "concerted" and "activities" that are absent from the Board's decisions, *id.* at 1153;

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[2] The Ninth Circuit similarly held Section 7 is "unambiguous" in this regard and there was "no need to proceed to the second step of *Chevron*." *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016).

[3] The Board also did not argue in its *amicus* brief in *Lewis* that Section 7 was unambiguous but relied on its authority to construe Section 7. *See Lewis*, No. 15-2997, NLRB *Amicus* Br. at 8-9 (7th Cir. Dec. 16, 2015) (the "Board's construction of Section 7 to encompass concerted legal activity . . . is supported by longstanding Board and court precedent, and reflects the Board's judgment that legal activity accomplishes the congressional goal of avoiding strife and economic disruptions with particular effectiveness").

- Concluded Section 7's "concerted activity" unambiguously applies to "collective lawsuits," "the plain language of Section 7 encompasses [collective legal proceedings]," and "Section 7's plain language controls, and protects collective legal processes," *id.* at 1153-54;
- Concluded Section 7 of the NLRA renders arbitration agreements waiving class procedures "illegal", *id.* at 1157; and
- Reasoned there is no conflict between the NLRA and the FAA because the FAA's savings clause provides arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and "[i]llegality is one of those grounds." *Id.*

In contrast, *Horton I*:

- Reviewed precedent to trace the Board's construction of "concerted activity" for "mutual aid and protection" to cover the collective pursuit of workplace grievances, including through litigation, 357 NLRB at 2278-79;

- Applied *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to hold a mandatory arbitration agreement waiving class procedures qualified as a workplace rule that expressly restricts protected activity, *id.* at 2280;
- Relied on cases finding certain individual employment agreements interfered with collective bargaining and were unenforceable as a matter of public policy, *id.* at 2280-81;
- Considered whether finding an arbitration agreement unlawful based on the Board's interpretation of the NLRA and the "core principles of Federal labor policy" would conflict with the policies underlying the FAA and, if so, whether it should undertake a "careful accommodation" of the policies of both statutes "to the greatest extent possible," *id.* at 2284;
- Found, to the extent the FAA conflicts with the NLRA, the FAA was repealed in relevant part by the NLGA, *id.* at 2288; and
- Concluded *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) and *AT&T Mobility LLC v. Concepcion*, 563

U.S. 333 (2011) were not controlling because the Board was not mandating class arbitration but instead holding an employer could "leave[] open a judicial forum for class and collective claims" to satisfy Section 7, *id*.

Under *Chenery*, this Court "must judge the validity of an administrative [order] solely on 'the grounds upon which the [agency] itself based its action.'" *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (citations omitted). Even if this Court were to conclude the Board reached the right result (which it did not) but for the wrong reasons, it could not enforce the Board's order. *See id.* at 942 ("We express no opinion as to the correct test of 'concerted activities;' we require only that the Board . . . reconsider this matter free from its erroneous conception of the bounds of the law.").

II. The FAA mandates enforcement of the MAA.

Confining itself as it must to the Board's reasoning, this Court should conclude the Board, in *Horton I* and its progeny, misinterpreted the FAA. The FAA provides arbitration agreements like the MAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see*

also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122-23 (2001) (holding the FAA generally applies to employment arbitration agreements). The statute reflects an "emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi*, 565 U.S. ___, 132 S. Ct. 23, 25 (2011). The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 563 U.S. at 344.

Parties are generally free, as a matter of contract, to agree to the procedures governing their arbitrations. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.").

Under Section 2 of the FAA, a court may deem an arbitration agreement invalid only on grounds as exist "for the revocation of any contract," such as "fraud, duress, or unconscionability." *Concepcion*, 563 U.S. at 339. For instance, complaints about the "[m]ere inequality in

bargaining power" between an employer and employee cannot void an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Additionally, the Supreme Court repeatedly has rejected challenges to the "adequacy of arbitration procedures," concluding such attacks are "out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* at 30.

A party to an arbitration agreement "'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* at 31 (citation omitted). Thus, an arbitration agreement is enforceable even if it permits less discovery than in federal courts, and even if a resulting arbitration ***cannot "go forward as a class action or class relief [cannot] be granted by the arbitrator."*** *Id.* at 31-33 (internal quotations and citation omitted) (emphasis added).

State and federal courts "must enforce the [FAA] with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 1202 (2012) (per curiam). "That is the case even when the claims at issue are federal

statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. ___, 132 S. Ct. 665, 669 (2012) (citation omitted).

There is no congressional command for class procedures that overrides the strong mandate of the FAA. And, contrary to the Board's reasoning, the validity of Hobby Lobby's MAA is determined not by the NLRA, but by the FAA, which the Board has no authority to interpret.

A. Courts consistently enforce arbitration agreements containing class action waivers.

The MAA's provisions are ordinary and unexceptional. Before *Horton I*, numerous courts – including at least five Courts of Appeals – enforced under the FAA mandatory employment arbitration agreements waiving class procedures. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Vilches v. The Travelers Cos., Inc.*, 413 F. App'x 487, 494 & n.4 (3d Cir. 2011); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001).

On January 3, 2012, for the first time in the nearly 80-year history of the NLRA, the Board held in *Horton I* that the NLRA

prohibits the waiver of class procedures in employment arbitration agreements. 357 NLRB at 2277. The Fifth Circuit refused to enforce *Horton I. Horton II*, 737 F.3d 344. And scores of other federal and state courts, including the Second, Fifth, and Eighth Circuits, rejected *Horton I. See Murphy Oil I*, 361 NLRB No. 72 at 36 n.5 (Member Johnson, dissenting) (collecting citations); *see also Patterson v. Raymours Furniture Company, Inc.*, No. 15-2820-CV, 2016 WL 4598542, --- Fed. App'x ---- (2d Cir. Sept. 14, 2016); *Cellular Sales of Missouri, LLC v. NLRB,* 824 F.3d 772 (8th Cir. 2016); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

Disregarding this nearly universal judicial disapproval, the Board adhered to *Horton I* in *Murphy Oil I. Murphy Oil I*, slip. op. at 5-18. The Fifth Circuit again refused to enforce the Board's order. *Murphy Oil II*, 808 F.3d 1013. But invoking its nonacquiescence policy, the Board continues, as it did in this case, to apply *Horton I. Murphy Oil I*, slip op. at 2 n.17. And most courts continue to reject it.

Lewis broke with this overwhelming precedent to hold an employment arbitration agreement waiving class procedures violated

the NLRA and was unenforceable under the FAA. 823 F.3d at 1151. Notably, *Lewis* failed to cite or discuss *Stolt-Nielsen*, wrongly disregarded reasoning essential to *Concepcion*'s holding as *dicta*, and failed to adhere to the Supreme Court's rationale in those decisions that arbitration as protected by the FAA is presumptively ***bilateral***. *Lewis* has thus been criticized. *See, e.g.*, *Bekele v. Lyft, Inc.,* No. CV 15-11650-FDS, 2016 WL 4203412, at *20 (D. Mass. Aug. 9, 2016) (concluding "the Seventh Circuit's holding in *Lewis* would lead to consequences that are both odd and surely unintended").[4]

B. *Horton I*, on which the Board's decision was based, was wrongly decided.

The Board in *Horton I* misconstrued the FAA, which lies outside its authority.

1. *Horton I* wrongly rejected *Concepcion*'s authoritative interpretation of the FAA.

Whether or not the Board agrees with it, "[t]he Federal Arbitration Act is a law of the United States, and *Concepcion* is an

[4] The Ninth Circuit now holds the lawfulness of an employment arbitration agreement waiving class procedures hinges on whether it contains an opt-out provision. *Morris*, 834 F.3d at 982 n.4; *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1076 (9th Cir. 2014). The Ninth Circuit therefore also has parted ways with the Board, which holds opt-out provisions do not save such agreements. *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (Aug. 27, 2015), *enf. denied, On Assignment Staffing Servs., Inc. v. NLRA*, 2016 WL 3685206 (5th Cir. June 6, 2016).

authoritative interpretation of that Act." *Direct TV, Inc. v. Imburgia,* __ U.S. __, 136 S. Ct. 463, 468 (2015); *see also Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038, 1048 (N.D. Cal. 2012) (concluding court was bound by *Concepcion*'s "statement of the meaning and purposes of the FAA" in determining whether FAA or NLRA controlled enforceability of arbitration agreement). However, in *Horton I*, the Board circumvented *Concepcion* by wrongly reasoning its ban on employment agreements waiving class procedures is allowable under the FAA because it is not limited to arbitration agreements. 357 NLRB at 2285. The Board reasoned its new rule does not treat arbitration agreements "less favorably than other private contracts" in violation of the FAA. *Id.*

In *Concepcion,* the Supreme Court rejected the same attempt to evade the FAA and struck down a California rule prohibiting class action waivers. *Concepcion,* 563 U.S. at 341-44. *Concepcion* recognized courts can exhibit hostility to arbitration agreements by announcing facially neutral rules ostensibly applicable to all contracts. *Id.* at 341-42. For instance, a court might find unconscionable all agreements that fail to provide for "judicially monitored discovery." *Id.* "In practice, of course, the rule would have a disproportionate impact on arbitration

agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." *Id.* at 342. To avoid this result, the Court concluded the permissible grounds for invalidating arbitration agreements under Section 2 of the FAA may not include a "preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" *Id.* at 343 (citation omitted).

Therefore, a rule used to void an arbitration agreement is not saved under the FAA simply because it would apply to "any contract." The proper test is whether a facially neutral rule prefers procedures incompatible with arbitration and "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.*

Applying this test, the *Concepcion* Court held a rule mandating the availability of class procedures is incompatible with arbitration. *Id.* at 346-51. Arbitration as protected by the FAA is intended to be less formal than court proceedings to allow for the speedy and inexpensive resolution of disputes. *Id.* at 348. Such informality makes arbitration poorly suited to conducting class litigation with its heightened

complexity, due process issues, and stakes. *Id.* at 348-51. The Court reasoned:

> The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. ***Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.***

Id. at 344 (emphasis added).[5]

Horton I attempted to distinguish *Concepcion* by reasoning its decision did not require class arbitration. 357 NLRB at 2288. The Board claimed it required only the availability of class procedures in some forum, mandating employers ***either*** (i) permit class arbitration, ***or*** (ii) waive the arbitral forum to the extent an employee seeks to invoke class procedures in court. *Id.* But that was a distinction without a difference. Like the California law, *Horton I* "condition[s] the enforceability of certain arbitration agreements" on the availability of class procedures. *Concepcion,* 563 U.S. at 336. *Horton I*'s adding the option for parties to

[5] *Lewis* wrongly disregarded this reasoning, which was necessary to *Concepcion*'s holding, as *dicta*. 823 F.3d at 1157. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

avoid class arbitration by ***forgoing arbitration altogether*** does not reduce the degree to which the Board's ban on class action waivers "interferes with fundamental attributes of arbitration" and "creates a scheme inconsistent with the FAA." *Id.* at 336. Requiring a party to abandon the arbitral forum entirely to avoid class arbitration is an even greater obstacle to the FAA's policies than mandating class arbitration.[6]

2. *Horton I* wrongly interpreted *Gilmer* to conclude employees have a substantive right under the NLRA to obtain an adjudication of their legal claims by a particular means.

Horton I also wrongly reasoned an individual employment arbitration agreement waiving class procedures is unenforceable under the FAA because it requires employees to forgo a substantive statutory right in violation of *Gilmer*, 500 U.S. 20. *See* 357 NLRB at 2285-87. *Horton I*'s analysis was fundamentally inconsistent with the Supreme Court's reasoning in *Gilmer*. In considering whether arbitration would violate an employee's substantive statutory rights, *Horton I* looked to the wrong statute (the NLRA rather than the FLSA), failed to ask the correct question (whether the employee could vindicate his or her FLSA

[6] *Murphy Oil* dismissed *Concepcion* as dealing with federal preemption. *Murphy Oil*, slip op. at 9. But *Italian Colors* makes clear the *Concepcion* analysis applies equally to federal statutes. 133 S. Ct. at 2312.

rights effectively in arbitration), and came to the wrong answer (the arbitration agreement was unenforceable ***even if*** the employee could vindicate his or her FLSA rights effectively in arbitration).

The issue in *Gilmer* was whether a claim under the ADEA was subject to compulsory arbitration. *Gilmer,* 500 U.S. at 23. The Court observed, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* at 26 (citation omitted). "[S]o long as the prospective litigant effectively may vindicate [the] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (citation omitted).

The burden is on the party opposing arbitration to "show that Congress intended to preclude a waiver of a judicial forum" for the claim at issue. *Id.* at 26. The Court instructed "[i]f such an intention exists, it will be discoverable in the text of [the statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.* (citation omitted).

Contrary to *Gilmer* and every Supreme Court case on point, *Horton I* failed to treat as dispositive whether an employee could vindicate his statutory rights under the FLSA effectively under the arbitration agreement's procedures.[7] 357 NLRB at 2285-86 & n.23. Instead, the Board reasoned "the right allegedly violated *by the MAA* is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA." *Id.* at 2285 (emphasis in original).

The Supreme Court concluded such differences between arbitration procedures and judicial procedures did not *per se* render arbitration unsuitable for adjudicating statutory claims. *Horton I* ignored this fundamental teaching of *Gilmer* and its predecessors. Instead, *Horton I* held an arbitration agreement, to be enforceable under the FAA and the Act, ***must*** allow an employee to invoke certain procedures in the course of obtaining an adjudication of his or her statutory claims.

[7] The Supreme Court's other cases considering whether arbitration would violate a statutory right likewise asked whether a party could enforce a particular statutory claim effectively in arbitration. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985).

Strikingly, *Horton I* held an arbitration agreement was unenforceable even if the employee could vindicate his FLSA rights effectively under it. 357 NLRB at 2285-86 & n.23. *Horton I* deemed the arbitration agreement void ***solely due to the means*** it provided for arbitrators to adjudicate claims, regardless of the outcome of the adjudication. That was the opposite of *Gilmer*'s rationale.

Additionally, *Horton I* failed to apply *Gilmer*'s test (later amplified by *CompuCredit*) and look to the relevant statutory text, the statute's legislative history, or an "inherent conflict" between arbitration and the statute's underlying purposes. *Gilmer,* 500 U.S. at 26. In *CompuCredit Corp.*, the Court applied this test and analyzed the text of the Credit Repair Organizations Act ("CROA") to determine whether Congress intended to override the FAA. *CompuCredit Corp.,* 132 S. Ct. at 669. The *CompuCredit* Court reiterated that ***if a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms."*** *Id.* at 673 (emphasis added). Had *Horton I* explored Congress' intention regarding the preclusion of arbitration for FLSA claims (which the Board failed to do), it would have been compelled to

find FLSA claims are subject to arbitration. *See, e.g.*, *Carter*, 362 F.3d at 297 (holding "there is nothing in the FLSA's text or legislative history" and "nothing that would even implicitly" suggest Congress intended to preclude arbitration of FLSA claims).

Further, contrary to *Gilmer* (and *CompuCredit*), *Horton I* did not look for an indication in the NLRA's text or history of a congressional intent to override the FAA and require employees have access to class procedures. *Horton I* got the inquiry backwards, concluding "nothing in the text ***of the FAA*** suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." 357 NLRB at 2287 (emphasis added). If *Horton I* had asked the correct question, it would have found "there is no language in the NLRA (or in the related Norris-LaGuardia Act) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA." *Jasso*, 879 F. Supp. 2d at 1047; *see also Horton II*, 737 F.3d at 360. Such "silence" in the NLRA means "the FAA requires the [MAA] to

be enforced according to its terms." *CompuCredit Corp.*, 132 S. Ct. at 673.[8]

Horton I also reasoned there was "an inherent conflict" between the NLRA and the arbitration agreement's waiver of class procedures but cited no authority for its conclusion. 357 NLRB at 2286. The Supreme Court has never voided an arbitration agreement on "inherent conflict" grounds. Rather, courts repeatedly have found ***no*** "inherent conflict" between arbitration and other statutes. *See, e.g.*, *Gilmer*, 500 U.S. at 27-29; *Rodriguez*, 490 U.S. at 485-86; *McMahon*, 482 U.S. at 242; *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 680-81 (5th Cir. 2006). *Horton I*'s unfounded and unreasoned rationale to the contrary was an empty reference to *Gilmer* without analyzing its substance.

[8] The Board later conceded "the NLRA does not explicitly override the FAA." *Murphy Oil I,* slip op. at 10. It argued there was an "obvious reason" for this silence: when the NLRA was enacted in 1935 and reenacted in 1947, the FAA had not yet been applied to employment arbitration agreements, which only occurred much later in 2001. *Id.* Notably, *Murphy Oil I*'s new reasoning nullifies *Horton I*'s earlier rationale that Congress used the 1932 NLGA to repeal directly and the 1935 NLRA to repeal impliedly the 1925 FAA with respect to individual employment arbitration agreements decades ***before*** the FAA was recognized as applying to employment arbitration agreements. *Horton I,* 357 NLRB at 2288 & n.26.

3. *Horton I* erred in reasoning an arbitration agreement waiving class procedures is unenforceable on public policy grounds.

The FAA's savings clause does not permit the Board, as it has done, to declare an arbitration agreement waiving class procedures unenforceable as contrary to public policy.

a. *Horton I* improperly applied a common-law balancing test.

Incredibly, the Board treated the common law's "public policy" balancing test as giving it broad discretion to determine for itself whether the public policies underlying the NLRA and the NLGA rendered an arbitration agreement unenforceable despite the FAA's mandate and the absence of any indication that Congress intended to preclude individualized arbitrations. 357 NLRB at 2287-88.[9] No precedent exists for applying this balancing test under the FAA. Because the FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution," *KPMG LLP*, 132 S. Ct. at 25, an administrative agency cannot deviate from the congressional commands in the FAA based on the agency's own assessment of public policy absent an equally

[9] The Board wrongly relied on *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), failing to note the NLRA provision at issue – Section 8(e) – ***expressly*** voids certain contracts. 357 NLRB at 2287.

clear congressional directive in another statute to the contrary. *See CompuCredit*, 132 S. Ct. at 672 (when Congress restricts the use of arbitration, it does so clearly). In *Horton I*, the Board improperly relied on its own weighing of public policies rather than deferring to congressional purpose. 357 NLRB at 2287-88.

b. There is no precedent for *Horton I*'s holding that arbitration agreements waiving class procedures conflict with the NLRA.

Horton I cited no decision during the NLRA's 80-year history holding a contract unenforceable because it interfered with employees' general "right to engage in protected concerted action." The Board cited only decisions in which courts enforced Board orders that specific employers cease and desist from enforcing individual employment agreements those employers used to interfere with specific, well-defined rights granted employees in Section 7, not the general "right to engage in protected concerted action."

Horton I failed to acknowledge Section 7's rights run from the well-defined and specific – the rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing" – to the very general right "to engage in other

concerted activities for the purpose of . . . other mutual aid or protection." 29 U.S.C. § 157. None of the decisions *Horton I* cited held an employment agreement unenforceable because it allegedly violated an employee's amorphous Section 7 right to engage in concerted activities for mutual aid or protection. 357 NLRB at 2280-81 & n.7.

In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), an employer refused to recognize a union and established a committee to negotiate individual employment contracts in lieu of collective bargaining. The Supreme Court found those individual contracts "were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act." *Nat'l Licorice Co.,* 309 U.S. at 361.

Four years later, in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), an employer claimed it need not bargain collectively because it already had entered individual employment agreements with employees prior to a certification of the union as their exclusive bargaining representative. The Court did ***not void the individual agreements*** but held their existence did not excuse the employer from bargaining collectively

because each individual employment agreement would be superseded by the terms of any collective bargaining agreement. *J.I. Case Co.*, 321 U.S. at 336-38. The other decisions cited by *Horton I* all involved employers' use of individual employment agreements prior to *J.I. Case* to attempt to avoid employees' specific Section 7 rights to form or join labor organizations and engage in collective bargaining. 357 NLRB at 2280-81 & n.7.

Horton I wrongly reasoned these decisions held individual agreements unlawful because they "purport to restrict Section 7 rights." *Id.* at 4. But the Board's extrapolation went too far. *Cf., Webster v. Perales*, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008) (rejecting Board's overbroad characterization of *National Licorice*). Rather, the old decisions cited by *Horton I* affirmed the Board's remedial orders that specific employers cease enforcing specific individual agreements used in willful attempts to avoid collective bargaining. Those employers acted with anti-union animus and required individual agreements for the purpose of interfering with collective bargaining. *See also Johnmohammadi,* 755 F.3d 1076–77 (distinguishing *National Licorice*,

J.I. Case, and related cases from arbitration agreements waiving class procedures).

The differences between an employer's using individual employment agreements to obstruct collective bargaining and using individual arbitration agreements to resolve employment disputes are stark. An individual arbitration agreement does not and cannot avoid collective bargaining with a union.[10] Federal law and policy also recognize the legitimacy of employment arbitration and encourage it. *Circuit City Stores*, 532 U.S. at 122-23. The Supreme Court has also recognized the absence of class procedures in arbitration is reasonable and assumed. *Concepcion*, 563 U.S. at 344-52; *Stolt-Nielsen*, 559 U.S. at 685 ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."). The anti-union cases cited by the Board did not involve employers' entering individual agreements ***encouraged by federal policy as legitimate and beneficial***.

[10] Under *J.I. Case*, if a union came to represent Hobby Lobby's employees, and if the parties agreed upon a collective bargaining agreement ("CBA"), that CBA might supersede an individual arbitration agreement to the extent the CBA's terms varied from the arbitration agreement, but that is not the scenario presented here or in *Horton I*. *See Johnmohammadi*, 755 F.3d at 1076-77.

c. Requiring individual arbitration is not equivalent to retaliating against employees.

Horton I unreasonably equated requiring arbitration that waives class procedures as a condition of employment with retaliating against employees for exercising NLRA rights, relying on decisions in which employers terminated employees for filing lawsuits. 357 NLRB at 2278-79 & n.4. However, implementing an across-the-board individual arbitration program is not equivalent to firing employees because they sue their employer. The former involves action recognized by the law as legitimate. Again, federal law acknowledges individual employment arbitration yields benefits to the parties (including employees) and public by reducing the burdens and costs of litigation while preserving individuals' ability to vindicate their claims. Therefore, when an employer declines to employ individuals who refuse to agree to individualized arbitration, the employer's actions are in furtherance of ends Congress and the courts have deemed legitimate and beneficial under the FAA.

4. *Horton I* erred in reasoning the NLGA trumps the FAA.

The Board was without authority to conclude the NLGA voided employment arbitration agreements with class action waivers and partially repealed the FAA. 357 NLRB at 2281-82, 2288. The Court must reject *Horton I*'s novel interpretation of the NLGA. Enacted in 1932, the NLGA divested federal courts of jurisdiction to issue restraining orders and injunctions "in a case involving or growing out of a labor dispute," except as provided therein. 29 U.S.C. § 101. The statute further provides "yellow-dog" contracts – contracts in which an employee agreed "not to join, become, or remain a member" of a labor organization and agreed his employment would terminate if he did – are unenforceable in federal courts. *Id.* § 103. The statute also provided that any agreement "in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." *Id.*

Horton I incorrectly concluded the NLGA "prohibit[s] the enforcement of . . . agreements comparable to" an individual

employment arbitration agreement. But *Horton I*'s extension of the NLGA to individual arbitration agreements distorted history and the statute. 357 NLRB at 2281.

First, when the NLGA was adopted in 1932, the Federal Rules, the FLSA, and the modern class action device did not exist. To suggest the NLGA manifests a Congressional intention that employees have a substantive, non-waivable right to invoke class procedures not yet adopted is absurd.[11]

Horton I's analogy to "yellow-dog" contracts also failed. If an employee promises to arbitrate individually and is hired, but then files a class action lawsuit in breach of the promise, an arbitration agreement like the MAA does not provide the employee's employment will terminate for having done so, as would occur under a "yellow-dog" contract. Rather, an employer will move to compel individualized arbitration under the FAA, with no effect on employment status.

Even assuming conflict exists between the NLGA and the FAA, it would be up to courts, not the Board, to resolve that conflict between

[11] *Lewis* cited no authority for its assertion "Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA" in 1935. *Lewis*, 823 F.3d at 1154. Nor did *Lewis* or the Board cite any case from 1935, 1932, or earlier in which an employee brought a representative action for damages on behalf of other employees. *Cf. Concepcion*, 563 U.S.at 349 ("[C]lass arbitration was not even envisioned by Congress when it passed the FAA in 1925.").

two federal statutes outside the Board's jurisdiction. *See, e.g.*, *Owens*, 702 F.3d at 1053. Courts would likely "reconcile" the decades-old NLGA with the Supreme Court's more recent jurisprudence under the FAA. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-252 (1970). The Supreme Court has clarified the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted.

In *Boys Markets*, the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement when that agreement provided for binding arbitration of the dispute. The Court concluded the NLGA "must be accommodated to the subsequently enacted" Labor Management Relations Act ("LMRA") "and the purposes of arbitration" as envisioned under the LMRA. *Boys Market, Inc.,* 398 U.S. at 250. The Court noted that through the LMRA, Congress attached significant importance to arbitration to settle labor disputes. *Id.* at 252.

The Court found the NLGA "was responsive to a situation totally different from that which exists today." *Id.* at 250. When it was passed,

federal courts regularly entered injunctions "against the activities of labor groups." *Id.* To stop this, Congress passed the NLGA "to limit severely the power of the federal courts to issue injunctions" in cases involving labor disputes. *Id.* at 251. However, in following years, Congress' focus "shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Id.* Because this "shift in emphasis" occurred "without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act," "it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." *Id.*

Here, even if the NLGA could be construed as applying to individual employment arbitration agreements, that construction must give way because of the FAA and subsequent developments. An arbitration agreement with a class action waiver is not "the type of situation to which the Norris-LaGuardia Act was responsive." *Id.* at 251-52. An employment arbitration agreement is unrelated to the NLGA's core purpose of fostering the growth of labor organizations at

the dawn of the last century. Just as the LMRA manifests a strong congressional policy for labor arbitration, the FAA evinces a strong policy for the enforcement of arbitration agreements. Just as the NLGA must be viewed as accommodating Congress' intentions under the LMRA, so too must it accommodate Congress' intentions under the FAA.

Finally, *Horton I* got the chronology wrong. *Horton I* assumed the FAA was enacted in 1925 and predated both the NLGA and the NLRA, 357 NLRB at 2284, and therefore, if the FAA conflicted with either statute, the FAA must have been repealed, either by the NLGA's express provision repealing statutes in conflict with it or impliedly by the NLRA. *Id.* at 2288 & n.26.

The Board, however, failed to account for the dates when the NLRA and FAA were ***re-enacted***, which are the relevant dates for this analysis. *See Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to ***re-enactment*** date of the Railway Labor Act to determine it post-dated the NLGA and concluding "[i]n the event of irreconcilable conflict" between the two statutes, the former would prevail).

Congress enacted the NLGA in 1932; re-enacted the NLRA on June 23, 1947; and re-enacted the FAA on July 30, 1947. *See* 47 Stat. 70; 61 Stat. 136; 61 Stat. 670. Of these three statutes, the FAA is the most recently re-enacted. If any "irreconcilable conflict" existed among them, the FAA would prevail.

Realizing its mistake, in *Murphy Oil I*, the Board argued the FAA's reenactment in 1947 did not alter the NLGA or NLRA. It reasoned, "[i]t seems inconceivable that legislation effectively restricting the scope of the [NLGA] and the NLRA could be enacted without debate or even notice." *Murphy Oil I*, slip op. at 11. However, *Horton I* and *Murphy Oil I* nevertheless assume the enactment of the NLGA and NLRA restricted the 1925-enacted FAA regarding the enforceability of arbitration agreements "without debate or even notice." Rather than speculating which statute silently and impliedly repealed or amended the other, it is far more plausible to read the NLGA and NLRA as simply not in conflict with the FAA because neither of those statutes concerns the enforceability of individual employment arbitration agreements.

III. The NLRA does not create a substantive right to invoke class procedures.

Irrespective of the FAA's requirements, *Horton I* is also wrong for another and even more basic reason: the NLRA does not provide a non-waivable right to invoke class procedures. *Murphy Oil II*, 808 F.3d at 1016 (the "'use of class action procedures ... is not a substantive right' under Section 7 of the NLRA"). The Board's unprecedented holding far exceeded the Board's authority.

A. The text, history, and purpose of the NLRA have never been construed to grant employees a right to have their legal claims adjudicated collectively.

The plain text of the NLRA does not mention the procedures by which employees may seek to have employment-related claims adjudicated.[12] Despite the statute's silence, *Horton I* reasoned that employees' statutory right to act concertedly for mutual aid and protection includes a substantive right to invoke class procedures. 357 NLRB at 2278. However, the Board mis-cited cases showing only that Section 7 protects employees from retaliation for concertedly ***asserting*** they have certain legal rights (*e.g.*, by circulating petitions, making demands, and filing charges and complaints), not that Section 7 gives

[12] The Board did not reason otherwise in contrast to *Lewis*. *See* 823 F.3d at 1154.

employees a right to seek the collective ***adjudication*** of their legal claims (*e.g.*, by having their motions for class certification decided on their merits).

In *Horton I*, the Board mistakenly contended *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) recognizes a right to seek the collective adjudication of claims. 357 NLRB at 2278. In reality, *Eastex* addressed whether Section 7 protected a union's distribution of a newsletter touching on political issues outside the immediate employer-employee relationship. 437 U.S. at 563. The Court held this activity was protected because employees do not lose the protection of Section 7 when they seek "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Id.* at 565-67. For context, but not as a holding, the Court observed:

> Thus, it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause.

Id.

The Board ignored the fact that *Eastex* qualified this *dicta* regarding "resort to administrative and judicial forums" by declaring "***[w]e do not address here the question of what may constitute 'concerted' activities in this context.***" *Id.* at 566 n.15 (emphasis added).[13] *Eastex* also does not mention a purported right under Section 7 to invoke class procedures or seek the collective adjudication of claims.

The *Horton I* Board similarly missed the point of *Salt River Valley*. 357 NLRB at 2279. That case makes clear Section 7 provides employees a right to assert their employment-related legal rights concertedly, which differs from an alleged right to invoke class procedures in seeking an adjudication of legal claims. *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 863-64 (1952). Critically, the employees in that case never sued. Rather, their concerted activities in asserting their legal rights all occurred ***outside*** any adjudicatory proceeding. That protected conduct involved the employees' attempting to exert group pressure on their employer and union to negotiate a settlement of their claims or pooling resources to finance litigation. *Salt*

[13] *Lewis* likewise failed to recognize this statement was *dicta* and ignored the Supreme Court's qualification of it. 823 F.3d at 1152.

River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953). But the Board in *Horton I* failed to recognize that ***the employees' protected concerted activities in* Salt River Valley *did not utilize or depend on class litigation procedures.*** The Board identified no protected activities undertaken by the employees in *Salt River Valley* that an individual arbitration agreement like the MAA allegedly prohibits.

The other decisions cited by *Horton I* similarly lack any hint employees have a Section 7 right to collective adjudication procedures. Rather, those cases demonstrate the general proposition that employers may not retaliate against employees for concertedly asserting legal rights relating to the terms and conditions of employment. 357 NLRB at 2278-79 & n.4.

Before *Horton I*, no authority ever held Section 7 grants employees the right to have their employment-related legal claims adjudicated collectively. Section 7 concerns the bargaining process between employers and employees regarding the terms and conditions of employment. *See, e.g.*, *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 845 (1984) ("[I]n enacting § 7 of the NLRA, Congress sought generally to

equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.").

The adjudication of legal claims differs from bargaining; it is "[t]he legal process of resolving a dispute; the process of judicially deciding a case." Black's Law Dictionary (9th ed. 2009), adjudication; *see also Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins., Co.,* 559 U.S. 393, 408 (2010) (plurality opinion) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."). The processes by which judges and arbitrators adjudicate legal claims are unrelated to Section 7's concern with equalizing bargaining power, and adjudicatory procedures like those under Rule 23 are beyond the NLRB's limited authority.

The cases cited by the Board (*e.g.*, *Eastex* and *Brady*) show only that jointly filing a legal complaint is one way employees concertedly assert legal rights, and employees who do so may be protected from retaliation under the NLRA. 357 NLRB at 2278 & n.4. However, many ways exist for employees to assert legal rights concertedly. Employees

do so through conversations and meetings with their employers, internal complaints and grievances, correspondence, petitions, postings, demonstrations, administrative charges, and settlement demands, among others. They also may do so by working together in filing multiple individual lawsuits or arbitration demands. All these activities allow employees to gain the advantages of solidarity to exert group pressure on their employer and increase bargaining power.

The Board does not – and could not – contend employees' individual claims somehow become stronger when decided collectively in a single proceeding. An employee who asserts his or her claim as a member of a 1,000-person class has no greater right under the FLSA or any other law than when he or she asserts the claim individually. Nor is an employee more likely to receive an adverse judgment when he or she seeks an adjudication of the claim in an individual proceeding. Judges and arbitrators must adjudicate each party's claims based on the law and facts, irrespective of the parties' power. *See, e.g.*, 28 U.S.C. § 453 (requiring each judge or justice of the United States to swear he or she "will administer justice without respect to persons, and do equal right to the poor and to the rich"). Section 7's concern with equalizing

employees' bargaining power with that of their employers has nothing to do with courts' and arbitrators' impartial adjudication of employees' legal claims.

In *Murphy Oil I*, the Board reasoned "as a practical matter, litigation routinely does involve not only adjudication by a court or arbitrator, but also bargaining between the parties: that is how cases settle, as most of them do." *Murphy Oil I*, *slip op.* at 18. But the Board lacks authority to grant employees a right to use ***class procedures as an economic weapon*** to force settlement.

Class certification can impose on defendants disproportionate costs and the risk of financial ruin in the event of an erroneous judgment, compelling them to settle class actions irrespective of the merits of the underlying claims. Commentators and courts have recognized this as a problem with class procedures. *See, e.g.*, *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). The Federal Rules were amended in 1998 to allow interlocutory appeals from class certification decisions, in part because "[a]n order granting certification . . . ***may force a defendant to settle*** rather than incur the costs of defending a class action and run the risk of potentially ruinous

liability." *See* Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendments) (emphasis added); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002).

The Board lacks authority to treat this ***problem*** with class procedures – their imposing such substantial costs and risks they effectively prevent the adjudication of the underlying claims – as a ***benefit*** to which employees are entitled under Section 7 to equalize their bargaining power.

First, equal bargaining power in negotiating legal claims comes from the prospects of a ruling by a court or arbitrator on the merits based on the law and facts, not from imposing expenses and risks that compel settlement regardless of the merits. That is "judicial blackmail," not bargaining. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

Second, any increase in bargaining power that class certification might give plaintiff-employees does not result from those employees' group activity; rather, it is a byproduct of court procedures imposing on defendants grossly disproportionate costs and risks. Class certification does not allow employee-plaintiffs just to "equalize" their bargaining

power with that of their defendant-employers but to far exceed it, ***irrespective of the merits of their claims***. In these circumstances, employees' invocation of class procedures is not a means of engaging in concerted activity for mutual aid and protection but the wielding of an economic weapon to force acceptance of their economic demands.

The Board's attempt to grant employees a substantive right under Section 7 to deploy judicial procedures as an economic weapon – a use irrelevant to the intended purposes of those procedures – is beyond the Board's authority. So, too, is the Board's attempt to bar employers from using individual arbitration agreements, consistent with the FAA, simply because they may blunt that economic weapon. *See, e.g.*, *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) ("Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."); *NLRB v. Brown*, 380 U.S. 278, 283 (1965) ("[T]here are many economic weapons which an employer may use that . . . interfere in some measure with concerted employee activities . . . and yet the use of such economic weapons does not constitute conduct that is

within the prohibition of either § 8(a)(1) or § 8(a)(3). Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself 'virtually strikeproof.'"); *Ins. Agents' Int'l Union,* 361 U.S. at 499-500 ("[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."). Just as the NLRA permits employers to blunt the effectiveness of an employee strike, so, too, must it permit an employer to implement an arbitration agreement consistent with the FAA even though it may blunt employees' ability to impose higher litigation costs on the employer to extort higher cost-of-defense settlements.

B. The right to engage in concerted activity does not necessitate banning individual arbitration agreements.

The Board also conflates invoking class adjudicatory procedures with concertedly asserting legal rights. *Horton I* ignored how employees

can act concertedly in asserting legal rights and claims that have nothing to do with class adjudication procedures. Irrespective of an individual arbitration agreement, employees can work together in asserting their common legal rights by (1) pooling their finances, (2) making joint settlement demands and negotiating as a group, (3) sharing information, (4) soliciting other employees to assert the same claims, (5) acting in concert to initiate multiple individual arbitrations asserting the same claims, (6) obtaining common representation, (7) jointly investigating their claims, (8) developing common legal theories and strategies, and (9) testifying on behalf of one another . *Cf.* Kenneth T. Lopatka, "A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws," 63 S.C. L. Rev. 43, 92 (Autumn 2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits.").

Hobby Lobby's MAA does not prevent employees from acting concertedly in pursuing their individual arbitrations. *See, e.g.*, *Kicic v. Hobby Lobby Stores, Inc.*, Case No. 2:16-cv-197 (S.D. Ind. June 24, 2016), ECF No. 16-1 ("Affidavit of Rebecca S. Predovan") at ¶¶ 1-10 (noting two former Hobby Lobby employees represented by the same attorneys simultaneously filed individual arbitrations under the MAA alleging the same claims).

IV. The Board lacked authority under the NLRA to grant employees a new, substantive, non-waivable right to class procedures.

While the Board may have responsibility "to adapt the Act to changing patterns of industrial life," reviewing courts "are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act." *Weingarten,* 420 U.S. at 266 (citation omitted). The courts are charged with ensuring the Board's remedial preferences do not "potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds*, 535 U.S. at 144.

The Board's reasoning in *Horton I* is not entitled to deference and is unreasonable and impermissible because it "wholly ignore[s] other

and equally important Congressional objectives." *Southern S.S. Co.*, 316 U.S. at 47. Those other objectives are well outside the Board's authority to define. *Horton I* does not solely, or even primarily, interpret the NLRA. Rather, the Board interpreted Section 7 to grant employees a substantive, non-waivable right to access ***judicial procedures that are created by, and exist solely by virtue of, laws other than the NLRA such as the FLSA and the Federal Rules***. The Board's attempt to recognize a new, substantive, non-waivable NLRA right to class procedures "trench[es] upon" not only the FAA but the Rules Enabling Act, the Federal Rules, and the FLSA, among other laws and policies outside the Board's expertise and authority.

A. The shifting positions of NLRB personnel demonstrate the lack of a purported NLRA right to class procedures.

The contradictory positions of Board representatives in handling the charge in *Horton I* demonstrate the Board changed its reasoning but without explaining why. The Board's new rule, which represents a substantial change in the law, is therefore not entitled to deference.

The Regional Director in *Horton* partially dismissed the unfair labor practice charge, concluding "***application of the class action***

mechanism is primarily a procedural device and the effect on Section 7 rights of prohibiting its use is not significant." JA.295 (D.R. Horton, Inc.'s Record Excerpts at Tab 7 ("Regional Director's partial refusal to issue complaint"), *Horton II*, No. 12-60031 (5th Cir. Aug. 29, 2008)). The Office of Appeals affirmed denial of the charge regarding class arbitrations but concluded the arbitration agreement "could be read as precluding employees from joining together to challenge the validity of the waiver by filing a class action lawsuit." JA.299 (D.R. Horton, Inc.'s Record Excerpts at Tab 6 ("Office of Appeals' ruling"), *Horton II*, No. 12-60031 (5th Cir. June 16, 2010)). This ruling was consistent with the Board General Counsel's Memorandum GC 10-06, which provided employers could "***lawfully seek to have a class action complaint dismissed by the court on the ground that each purported class member is bound by his or her signing of a lawful Gilmer agreement/waiver***." JA.308 (emphasis added). The ALJ in *Horton* then ruled he was "***not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims***." *Horton I,* 357 NLRB at 2292 (emphasis added). The Acting General Counsel, in

excepting to the ALJ's decision, argued "***an employer has the right to limit arbitration to individual claims – as long as it is clear that there will be no retaliation for concertedly challenging the agreement***." *See* JA.311 (Acting General Counsel's Reply Brief to Respondent's Answering Brief, *In re D.R. Horton, Inc.*, No. 12-CA-025764 (NLRB Apr. 25, 2011) (emphasis added)). Finally, *Horton I* – diverging from these positions – held the waiver of class procedures violates the NLRA. *Horton I,* 357 NLRB at 2277. The Board's failure to explain its changing position prevents deference to its decision. *Encino Motorcars*, 136 S. Ct. at 2125–26.

B. A purported NLRA right to class procedures conflicts with the Rules Enabling Act and the Federal Rules of Civil Procedure.

The Board's attempt to create a substantive, non-waivable right to class procedures also would violate the Rules Enabling Act ("REA"), which the Board failed to cite or address. In the REA, Congress delegated authority to the Supreme Court to promulgate the Federal Rules. 28 U.S.C. § 2072(b). The REA expressly provides the Federal Rules "shall not abridge, enlarge or modify any substantive right." *Id.*

In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, a plurality of the Supreme Court differentiated a "substantive right" from a procedural one, explaining a rule of procedure is valid under the REA only if it "really regulat[es] procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 559 U.S. at 406 (internal quotation marks and citation omitted). Regarding the validity under the REA of the Federal Rules' various joinder mechanisms, the plurality opinion reasoned Rule 23 is permissible because:

> A class action, no less than traditional joinder (of which it is a species), ***merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.***

Id. at 408 (emphasis added).

Horton I erroneously treated Rule 23 as enlarging substantive rights under the NLRA and abridging them under the FAA. On one hand, the Board contended employees have a substantive right under the NLRA to invoke Rule 23 and seek class certification. But a "right" to invoke Rule 23 could not exist without the rule itself. Consider a

hypothetical in which Rule 23 was never promulgated. Section 7 standing alone obviously would not provide employees any right to seek class certification in federal court. Under the Board's view, this purported right grew out of Section 7 with the adoption of Rule 23. The Board construed Rule 23 as expanding employees' substantive rights under Section 7, which, if the Board were right, would violate the REA.

Conversely, the Board viewed Rule 23, when combined with Section 7, as limiting parties' substantive rights under the FAA to agree to procedures governing their arbitrations. If it were right, this also would violate the REA. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. __, 133 S. Ct. 2304, 2309-10 (2013) (an entitlement to class proceedings would abridge or modify substantive rights, in violation of the REA); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487-88 (2d Cir. 2013) (under the REA, "Rule 23 cannot create a non-waivable, substantive right to bring" a pattern-or-practice class action under Title VII).

The Board's attempt to create a substantive, non-waivable right to class procedures is at odds with Rule 23, the Federal Rules and other standards governing procedures for adjudication. Courts have held

repeatedly that litigants do not have a substantive right to class action procedures under Rule 23 and such procedures are waivable. *E.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."). State class action procedures are treated similarly. *See, e.g.*, *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) (holding there is no "substantive right to pursue a class action" in either state or federal court).

C. A purported NLRA right to class procedures conflicts with the FLSA.

The collective adjudication of FLSA claims is governed by section 216(b) of the FLSA. The Board failed to consider that individual arbitration is fully consistent with the purposes underlying Section 216(b).

Congress adopted the Portal-to-Portal Act in 1947 to amend the FLSA to ***limit*** the number of collective actions filed and require every employee who participates in such actions to give his or her ***individual*** consent to be a party-plaintiff. *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). No rational basis exists for finding an

arbitration agreement that includes a waiver of class procedures interferes more with employees' purported right to engage in concerted activity than the FLSA's own individual opt-in requirement, which is waivable.

Moreover, the procedures for identifying and notifying putative collective action members of their opportunity to opt into an FLSA collective action have been developed by courts through their inherent, discretionary authority to manage cases. *Hoffmann-La Roche, Inc.*, 493 U.S. at 165. The NLRA cannot reasonably be construed to provide employees a substantive right to invoke notification and certification procedures developed by courts in exercising judicial discretion.

D. A purported NLRA right to "invoke" class procedures is unreasonable because the Board cannot mandate class or collective certification.

Irrespective of the Board's construction of the NLRA, a court may deny an employee's motion for class or collective action certification. The Board conceded Section 7 cannot grant employees a "right to class certification" and that employers may oppose employees' motions for certification without violating their Section 7 rights. 357 NLRB at 2286 & n.24.

To overcome this obstacle, the Board held Section 7 guarantees employees only a limited right: "to take the collective action inherent in ***seeking*** class certification, whether or not they are ultimately successful under Rule 23" and "to act concertedly by ***invoking*** Rule 23, Section 216(b), or other legal procedures." *Id.* (emphasis added). However, this limited "right" (to act concertedly by ***invoking*** Rule 23 and ***seeking*** class certification) makes no sense in practice.

An individual employment arbitration agreement does not abridge any purported right to concertedly "seek" class certification and "invoke" Rule 23 procedures, any more than would an employer's filing an opposition to an employee's motion for class certification – which *Horton I* admits is permissible. ***An arbitration agreement does not prevent employees from filing a class action lawsuit that "seeks" class certification and "invokes" Rule 23.*** Pursuant to an individual arbitration agreement, the employer may respond to such a lawsuit by moving to stay or dismiss the action and compel individual arbitration. But *Horton I* fails to identify any rational difference ***for Section 7 purposes*** between an employer's responding to a class action lawsuit with a successful motion to compel individualized arbitration and

responding with a successful opposition to class certification. ***In each instance, by the time the employer files its motion, the employee will have taken "the collective action inherent in seeking class certification" and will have acted concertedly by "invoking" class certification procedures.*** The Board failed to explain why employees will not have already fully exercised the very narrow alleged right identified by *Horton I* whenever they file a class action complaint ***invoking*** Rule 23 and Section 216(b). Further, *Italian Colors* forecloses any argument employees have a non-waivable right under the NLRA to try to satisfy Rule 23's requirements. 133 S. Ct. at 2310.

E. A purported NLRA right to class procedures is unreasonable and impermissible on numerous other grounds.

The Board ignored a host of other considerations – nearly all outside its authority and expertise – that further render its holding in *Horton I* unreasonable.

1. The Board ignored the purposes of class procedures.

Class procedures allow courts to balance the interests of judicial efficiency with the demands of due process in adjudicating claims common to multiple litigants. 1 MCLAUGHLIN ON CLASS ACTIONS §1:1

(8th ed.). There is no basis in the NLRA, the Federal Rules, or case law for the Board's novel presumption class procedures must also serve concerns under the NLRA.

2. The Board ignored protections and incentives for employees to pursue legal claims that do not depend on class procedures.

The Board failed to consider class procedures are unnecessary for employees to succeed in court or arbitrations on individual legal claims. Federal and state statutes almost universally contain anti-retaliation provisions and one-way fee-shifting provisions to permit employees to pursue their claims effectively on an individual basis.

Federal and state agencies also remain empowered to pursue class or collective actions on behalf of employees irrespective of employees' arbitration agreements waiving such procedures.

3. The Board ignored parties' substantial interests in individual arbitration.

The Board failed to consider that federal law recognizes individual employment arbitration yields benefits ***to employees*** and public by reducing the burdens and costs of litigation while preserving individuals' ability to vindicate their claims. *E.g.*, *Circuit City Stores, Inc.*, 532 U.S. at 122-23. Employers also have a legitimate interest in

agreeing to procedures – such as individualized arbitration – allowing the parties to obtain an adjudication of an employee's claim on its merits while avoiding substantial costs and risks of putative class litigation that are unrelated to the merits of a claim.

4. The Board rendered most employment arbitration agreements unenforceable.

Most employment arbitration agreements, if they do not expressly waive class procedures, are silent concerning them. The default position in interpreting arbitration agreements that are silent on class arbitration ***is to construe them as not permitting it***. *Stolt-Nielsen*, 559 U.S. at 685-86. ***In light of* Stolt-Nielsen*, most employment arbitration agreements would violate Section 7 under* Horton I.** *See Countrywide Fin. Corp.,* 362 NLRB No. 165 (Aug. 14, 2015) (extending *Horton I* to hold an employer violated Section 7 ***simply by moving to compel individual arbitration*** under an agreement that was ***silent*** regarding class procedures based on *Stolt-Nielsen*).

5. The Board wrongly presumed individuals who file class action complaints seek to initiate group action.

The Board's unfounded presumption in *Horton I* that "an individual who files a class or collective action regarding wages, hours

or working conditions" necessarily "seeks to initiate or induce group action" is simply untrue. 357 NLRB at 2279. Under the Federal Rules, individual plaintiffs can, and often do, make collective or class allegations solely for their own benefit. An attorney representing an individual employee may make such allegations – which implicitly threaten extensive and burdensome discovery – hoping to raise the stakes for the defendant and obtain a quicker or larger settlement ***on behalf of the individual***.

For all these reasons, *Horton I* is unreasonable and impermissible.

V. The MAA cannot reasonably be read to prohibit employees from filing unfair labor practice charges.

The Board wrongly held Hobby Lobby employees would reasonably misconstrue the MAA as restricting their access to file charges with the Board. JA.252. This finding lacked substantial evidence.

No employee could reasonably misinterpret the MAA as prohibiting Section 7 activity, including filing unfair labor practice charges with the Board. *See, e.g., Tiffany & Co.*, 200 L.R.R.M. (BNA) ¶ 2069 (NLRB Div. of Judges Aug. 5, 2014) (finding a confidentiality

clause lawful when it expressly excluded protected concerted activity from its coverage). The MAA expressly advises employees it does ***not*** apply to their filing complaints with federal or state agencies. The MAA states:

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (***including the right to file claims with federal, state or municipal government agencies***).

JA.108, 168 (emphasis added).

The Fifth Circuit recently made clear that it would ***not*** be reasonable for employees to read an arbitration agreement like the MAA as prohibiting the filing of charges with the Board where the agreement states explicitly that it does not do so. *Murphy Oil*, 2015 WL 6457613, at *5.

Here, the MAA explicitly states it does ***not*** apply to employees' "right to file claims with federal, state or municipal government agencies." JA.108, 168. Accordingly, it would be unreasonable for employees to read the MAA otherwise.

Neither the General Counsel nor the Charging Party offer ***any evidence*** that any employee has ever misinterpreted the MAA as

prohibiting his or her filing claims with the Board or any other federal, state, or municipal government agency. Because of the explicit statement in the MAA it does not prohibit such complaints, any such alleged misinterpretation of the MAA would be manifestly unreasonable.

VI. The Board's ordered remedy violates Hobby Lobby's First Amendment right to petition the Government.

Relying on *Murphy Oil I*, slip op. at 19-20, the Board held Hobby Lobby engaged in an unfair labor practice simply by filing ***successful*** motions to compel individual arbitration based on well-established Supreme Court precedent, including by filing motions to compel in *Fardig* and *Ortiz*. JA.251-52. The Board ordered Hobby Lobby to reimburse employees for any litigation costs relating to its motions to compel.[14] JA.254-55.

The remedies ordered by the Board are improper and unenforceable because Hobby Lobby did not engage in any unfair labor practices. The proposed remedies would deprive Hobby Lobby of its rights under the First Amendment to petition the government.

[14] The Board also found – without substantial evidence –Hobby Lobby violated Section 7 by filing a motion to compel individual arbitration in *Ortiz* – a single-plaintiff case. JA.277 n.3. But there was no evidence the lone plaintiff in *Ortiz* was engaged in concerted activity.

As summarized by this Court:

> To be enjoinable . . . [a] lawsuit prosecuted by the employer must (1) be "baseless" or "lack[ing] a reasonable basis in fact or law," and be filed "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7, or (2) have "an objective that is illegal under federal law."

Murphy Oil II, 2015 WL 6457613, at *6 (quoting *Bill Johnson's Restaurants*, 461 U.S. at 737 n.5, 744, 748).)

Here, two district courts granted Hobby Lobby's motions to compel individual arbitration under the MAA. *See Fardig*, 2014 WL 2810025; *Ortiz*, 52 F. Supp. 3d 1070. These rulings are *per se* evidence Hobby Lobby's motions to compel had a reasonable basis in law. Both courts rejected arguments the MAA was unenforceable based on the NLRA, and the Board should be bound by collateral estoppel based on those decisions. *See, e.g.*, *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 38 (1st Cir. 1987) (finding Board was collaterally estopped from re-deciding contract-formation issues already decided by district court).

As in *Murphy Oil II*, there is no basis to find Hobby Lobby's enforcement of its MAA was baseless, retaliatory, or with an objective illegal under federal law. The evidence shows only that certain employees sued in breach of the MAA and Hobby Lobby, relying on

extensive federal case law, defended itself by seeking to enforce the MAA.

The Board's finding that Hobby Lobby's enforcement of the MAA was unlawful was based only on the Board's decisions in *Horton I* and its progeny. However, the Fifth Circuit recently rejected a similar finding in *Murphy Oil II*. There, the Fifth Circuit explained:

> Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

2015 WL 6457613, at *6.

Here, Hobby Lobby likewise relied on multiple federal and state court decisions in moving to compel arbitration under the MAA. Although the Board may disagree with those decisions, that disagreement does not mean Hobby Lobby had no basis in fact or law or an "illegal objective" in relying on them. Those decisions, including *D.R. Horton II* and *Murphy Oil II*, remain good law in most jurisdictions where Hobby Lobby does business and have not been overruled by the Supreme Court.

Because Hobby Lobby had a constitutional right to petition the courts, and its motions did not fall under any *Bill Johnson's* exception, the Board's decision, remedy, and order must not be enforced.

CONCLUSION

Hobby Lobby asks this Court to decline to enforce the Board's Order and award it any further relief to which it may be entitled.

Respectfully submitted,

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CIRCUIT RULE 30(a) APPENDIX

Hobby Lobby Stores, Inc. *and* The Committee to Preserve the Religious Right to Organize. Case 20–CA–139745

May 18, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On September 8, 2015, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel and the Charging Party each filed cross exceptions and a supporting brief. The Respondent filed answering briefs, and the General Counsel and the Charging Party filed reply briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decisions in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part, 808 F.3d. 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found that maintaining the arbitration agreement violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board.

The Board has considered the decision and the record in light of the exceptions and briefs,[2] and we affirm the judge's rulings, findings and conclusions,[3] and adopt the recommended Order as modified and set forth in full below.[4]

[1] In addition, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Charging Party filed a postbrief letter calling the Board's attention to recent case authority.

On January 29, 2016, the Charging Party filed a "motion to allow oral argument and suggestion for public notice." The Respondent's exceptions also requested oral argument. We deny the Charging Party's motion, and the Respondent's request, as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] We find no merit in the Charging Party's cross-exceptions, which raise substantive arguments that are wholly outside the scope of the General Counsel's complaint. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. *Kimtruss Corp.*, 305 NLRB 710 (1991). Likewise, we reject the Charging Party's argument that the judge improperly approved the joint motion of the General Counsel and the Respondent for her to resolve the case on a stipulated record. The stipulated record includes sufficient evidence to evaluate the complaint, and the additional evidence that the Charging Party sought to introduce exceeded the scope of the General Counsel's theory.

[3] In adopting the judge's conclusions that the Respondent violated Sec. 8(a)(1) by maintaining and enforcing its Agreement, we do not rely on her findings that: (1) the burden was on the Respondent to show that its Agreement was subject to the Federal Arbitration Act (FAA); (2) the Respondent failed to show that its Agreement affected commerce within the meaning of the FAA; and (3) the Respondent's team truckdrivers were exempt from the FAA. We may assume for purposes of this case that the FAA is applicable because, consistent with our decisions in *D. R. Horton* and *Murphy Oil*, supra, "[f]inding a mandatory arbitration agreement unlawful under the National Labor Relations Act, insofar as it precludes employees from bringing joint, class, or collective workplace claims in any forum, does not conflict with the Federal Arbitration Act or undermine its policies." *Murphy Oil*, 361 NLRB 72, slip op. at 6, citing *D. R. Horton*, supra, 357 NLRB at 2283–2288.

To the extent the Respondent argues that plaintiffs Fardig and Ortiz were not engaged in concerted activity in filing their class action wage and hour lawsuits in the United States District Court for the Central District of California and the Eastern District of California, respectively, we reject that argument. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." Id., slip op. at 2. See also *D. R. Horton*, supra, 357 NLRB at 2279.

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Respondent's arbitration Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

We also reject the position of our dissenting colleague that the Respondent's motions to compel arbitration were protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. at 747, the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts that have the illegal

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3: "3. The Respondent violated Section 8(a)(1) when it enforced the MAA by asserting the MAA in litigation that Plaintiffs Fardig and Ortiz brought against the Respondent."

ORDER

The National Labor Relations Board orders that the Respondent, Hobby Lobby Stores, Inc., Oklahoma City, Oklahoma, with a place of business in Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) In the manner set forth in the remedy section of the judge's decision, reimburse Maribel Ortiz and any other plaintiffs in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.) and Jeremy Fardig and any other plaintiffs in *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.) for reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motions to dismiss the collective lawsuits and compel individual arbitration.

(d) Within 14 days after service by the Region, post at all facilities in California the attached notice marked "Appendix A," and at all other facilities employing covered employees, copies of the attached notice marked "Appendix B."[5] Copies of the notices, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2014, and any former employees against whom the Respondent has enforced its mandatory arbitration agreement since April 28, 2014. If the Re-

objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision (such as the Respondent's motions to compel arbitration in the underlying wage and hour lawsuits here), even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

Finally, we disagree with our dissenting colleague's conclusion that the Respondent's Agreement does not unlawfully interfere with employees' right to file unfair labor practice charges with the Board. We note that our colleague repeats an argument previously made, that an individual arbitration agreement lawfully may require the arbitration of unfair labor practice claims if the agreement reserves to employees the right to file charges with the Board. As explained in *Ralphs Grocery*, 363 NLRB No. 128, slip op. at 3, that argument is at odds with well-established Board law.

[4] We reject the Charging Party's request that we impose additional remedies on the Respondent, as the Charging Party has not shown that the remedies set forth in *D. R. Horton* and *Murphy Oil* are insufficient to remedy the Respondent's violations.

We have amended the judge's conclusions of law to reflect that fact that Plaintiffs Fardig and Ortiz, and not the Charging Party, filed the lawsuits against the Respondent; and we have corrected the Order to reflect the appropriate regional office and to conform to the Board's standard remedial language. Because the courts granted the Respondent's motions to compel individual arbitration and the lawsuits are no longer pending, we find it unnecessary to order the Respondent, as in *Murphy Oil* (slip op. at 21–22), to remedy the Sec. 8(a)(1) enforcement violation by notifying the court that it no longer opposes the lawsuits filed by Plaintiffs Fardig and Ortiz. We have also substituted the attached notices for those of the administrative law judge.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked Appendix B" to all current employees and former employees employed by the Respondent at those facilities at any time since April 28, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 18, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's Mutual Arbitration Agreement (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. Maribel Ortiz, Jeremy Fardig, and other employees each signed the Agreement. Later, Ortiz filed a lawsuit against the Respondent in federal court asserting class and representative claims for violations of federal and state wage and hour laws. In reliance on the Agreement, the Respondent filed a motion to compel individual arbitration, which the court granted. Fardig and other employees also filed a class action lawsuit against the Respondent in federal court alleging violations of wage and hour laws. Again relying on the Agreement, the Respondent filed a motion to compel individual arbitration, which the court granted. My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1] I also dissent from my colleagues' finding that the Agreement interferes with the right of employees to file charges with the Board.

1. *The "Class Action" Waiver.* I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, above, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[3] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[4] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file motions in federal court seeking to enforce the Agreement. It is relevant that the federal courts that had jurisdiction over the non-NLRA claims *granted* the Respondent's motions to compel arbitration. That the Respondent's motions were reasonably based is also supported by court decisions that have enforced similar agreements.[7] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[8] I also believe that any Board finding of a violation based on the Respondent's meritorious federal court motions to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I do not believe the Board can properly require the Respondent to reimburse Ortiz, Fardig, or any other plaintiffs for their attorneys' fees and litigation expenses in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

2. *Interference with NLRB Charge Filing.* I disagree with the judge's finding and my colleagues' conclusion that the Agreement violates Section 8(a)(1) by interfering with NLRB charge filing. The Agreement requires arbitration of all employment-related disputes, including those arising under the NLRA,[9] but expressly states that employees "are not giving up any substantive rights under federal, state, or municipal law (*including the right to file claims with federal*, state, or municipal *government agencies*)" (emphasis added). The judge found that although the Agreement does not preclude filing a charge with an administrative agency, the Agreement is unlawful because it requires arbitration of employment-related claims covered by the Act. However, for the reasons stated in my separate opinion in *Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly preserves the right to file claims or charges with the Board or, more generally, with administrative agencies. The Agreement preserves this right.

[5] The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See, e.g., *Murphy Oil, Inc., USA v. NLRB,* above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[6] Because my colleagues do not rely on the judge's findings regarding the FAA's application to the Agreement, I do not address them either. However, I disagree with my colleagues' assertion that, assuming the FAA applies here, finding an arbitration agreement that contains a class-action waiver unlawful under the NLRA does not conflict with the FAA. For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that arbitration agreements be enforced according to their terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[7] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's,* 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

[8] *Murphy Oil, Inc., USA v. NLRB*, 808 F.3d at 1021.

[9] The Agreement requires that "any dispute, demand, claim, controversy, cause of action or suit . . . that in any way arises out of, involves, or relates to Employee's employment . . . shall be submitted to and settled by final and binding arbitration." The only claims to which the Agreement does not apply are "claims for benefits under unemployment compensation laws or workers' compensation laws."

Accordingly, I respectfully dissent.
Dated, Washington, D.C. May 18, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL reimburse Maribel Ortiz, Jeremy Fardig, and any other plaintiffs for reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motions to dismiss their collective wage claims and compel individual arbitration.

HOBBY LOBBY STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20–CA–139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

HOBBY LOBBY STORES, INC.

The Board's decision can be found at www.nlrb.gov/case/20–CA–139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Yasmin Macariola, Esq., for the General Counsel.
Frank Birchfield, Esq., and *Christopher C. Murray, Esq.,* for the Respondent.
David Rosenfeld, Esq. for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried based on a joint motion and stipulation of facts I approved on June 29, 2015. The charge in this proceeding was filed by the Committee to Preserve the Religious Right to Organize (the Charging Party) on October 28, 2014, and a copy was served by regular mail on Respondent, on October 29, 2014. The General Counsel issued the original complaint on January 28, 2015, and an amended complaint on April 9, 2015. Hobby Lobby, Inc. (the Respondent or Company) filed timely answers denying all material allegations and setting forth defenses.

On June 2, 2015, the General Counsel and the Respondent filed a joint motion to submit a stipulated record to the Administrative Law Judge (Joint Motion). The Charging Party did not join the Joint Motion. On June 3, I issued an order granting the Charging Party until June 17, to file a response to the Joint Motions, including any objections to it. On June 17, the Charging Party filed objections to the Joint Motion, and the General Counsel and the Respondent, replied to the objections, respectively, on June 23 and 24. I issued an order granting the Joint Motion over the Charging Party's objections on June 29.[1]

The following issues are presented:

1. Whether the Respondent's Mandatory Arbitration Agreement (MAA) and related policies maintained by the Respondent, which requires employees, as a condition of employment, to waive their right to resolution of employment- related disputes by collective or class action violates Section 8(a)(l) of the National Labor Relations Act (the Act).
2. Whether the MAA maintained by the Respondent would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board in violation of Section 8(a)(l) of the Act.
3. Whether the Respondent's enforcement of the MAA through its motions to compel arbitration in *Jeremy Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVS-AN, U.S.D.C., Central District of California; and *Ortiz v. Hobby Lobby Stores*, Inc., 2:13-cv-01619-TLN-DAD, U.S.D.C., Eastern District Court of California, violates Section 8(a)(l) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Oklahoma corporation with several stores throughout the State of California, including one in Sacramento, California, has been engaged in business as a retailer specializing in arts, crafts, hobbies, home decor, holiday, and seasonal products. The parties admit, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. FACTS

The Respondent, Hobby Lobby, is a national retailer of arts, crafts, hobby supplies, home accents, holiday, and seasonal products. It operates approximately 660 stores in 47 states.

The Respondent employs individuals in various job titles including but not limited to the following: office clericals; security staff; cashiers; stockers; floral designers; picture framers; media buyers; craft designers; graphic & web designers; production artists; video tutorial hosts; leave assistants; production quality and compliance assistants; construction warehouse workers; customer service representatives; industrial engineers; inventory control specialists; maintenance technicians; pack-

[1] The June 3, 2015, order is hereby admitted into the record as administrative law judge (ALJ) Exh. 1, the Charging Party's June 17 response is admitted as ALJ Exh. 2, the General Counsel's June 23 reply is admitted as ALJ Exh.t 3, and the Respondent's June 24 reply is admitted as ALJ Exh. 4. The following abbreviations are used for citations in this decision: "Jt. Mot." for the General Counsel and Respondent's joint motion; "Jt. Exh." for the exhibits attached to the joint motion; "GC Br." for the General Counsel's brief; "R Br." for the Respondents' brief; and "CP Br." for the Charging Party's brief. Although I have included several citations to the record to highlight particular exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

ers/order pullers; photo editors; truck-trailer technicians; truck-trailer technician trainees; social media writers; sales and use tax accountants; and team truck drivers who transport Respondent's products across state lines. (Jt. Mot. ¶ 4(a) & ¶ 4(b).)

Upon commencing employment, all employees receive a copy of the Respondent's employee handbook. There are two different versions of the employee handbook—one for employees in California and one for employees outside of California. Employees must sign in receipt of the handbook and agree to be bound by its terms. The version applicable to employees in California states[2]:

> By my signature below, I acknowledge that I have received a copy of the Company's California Employee Handbook ("Employee Handbook"). I understand this Employee Handbook contains important information on the Company's policies, procedures, and rules. It also contains my obligations as an employee.
>
> I understand that this Employee Handbook replaces and supersedes any and all previous employee handbooks that I may have received, or agreements or promises made by any representative of the Company other than a Corporate Officer prior to the date of my signature below, and that I cannot rely upon any promises or representations made to me by anyone concerning the terms and conditions of my employment that are contrary to or inconsistent with this Employee Handbook, or any subsequent written modifications or revisions to this Employee Handbook posted on the Company's Employee Information Boards.
>
> I understand that my employment with the Company is conditioned upon the contents of this Employee Handbook. I further understand that, with the exception of the Submission of Disputes to Binding Arbitration section of this Employee Handbook and the Mutual Arbitration Agreement, the Company may alter, change, amend, rescind, or add to any policies, procedures, or rules set forth in this Employee Handbook from time to time with or without prior notice. I further understand that the Company will notify me of any material changes to this Employee Handbook, and that, by continuing employment after being so notified of such changes, I acknowledge, accept, and agree to such changes as a condition of my employment and continued employment.
>
> I understand that the employment relationship between me and the Company is at-will. I am employed on an at-will basis, as are all Company employees, and nothing to the contrary stated anywhere in this Employee Handbook or by any Company representative changes my or any employee's at-will status. I am free to resign at any time, for any reason, with or without notice. Similarly, the Company is free to terminate my employment at any time, for any reason, or for no reason at all. I also understand that nothing in this Employee Handbook is to be construed as creating, whether by implication or otherwise, any legal or contractual obligations or restrictions upon the Company's ability to terminate me as an employee at-will, for any reason at any time. Further, no person, other than a Corporate Officer of the Company, may enter into any written agreement amending this atwill employment policy or otherwise alter the at-will employment status of any employee.
>
> By my signature below, I acknowledge that I have read and understand the provisions of this Employee Handbook and agree to abide by all Company policies, procedures, practices, and rules.

Since at least April 28, 2014, the Respondent has maintained the MAA in its employee handbook. The MAA requires employees to waive resolution of employment-related disputes by class, representative or collective action or other otherwise jointly with any other person. Since at least April 28, 2014, the Respondent has required all of its employees to enter into the MAA in order to obtain and maintain employment with the Respondent. (Jt. Mot. ¶ 4(e) & ¶ 4(i).)

The MAA provides, in relevant part:

> This Mutual Arbitration Agreement ("Agreement"), by and between the undersigned employee ("Employee") and the Company, is made in consideration for the continued at-will employment of Employee, the benefits and compensation provided by Company to Employee, and Employee's and Company 's mutual agreement to arbitrate as provided in this Agreement. Employee and Company hereby agree that any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as "Dispute") that Employee may have, at any time following the acceptance and execution of this Agreement, with or against Company, its affiliates, subsidiaries, officers, directors, agents, attorneys, representatives, and/or other employees, that in any way arises out of, involves, or relates to Employee's employment with Company or the separation of Employee's employment with Company (including without limitation, all Disputes involving wrongful termination, wages, compensation, work hours, . . . sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, and all Disputes involving interference and/or retaliation relating to workers' compensation, family or medical leave, health and safety, harassment, discrimination, and/or the opposition of harassment or discrimination, and/or any other employment-related Dispute in tort or contract), shall be submitted to and settled by final and binding arbitration in the county and state in which Employee is or was employed. Such arbitration shall be conducted pursuant to the American Arbitration Association's National Rules for the Resolution of Employment Disputes or the Institute for Christian Conciliation's Rules of Procedure for Christian Conciliation, then in effect, before an arbitrator licensed to practice law in the state in which Employee is or was employed and who is experienced with employment law. . . . The parties agree that all Disputes contemplated in this Agreement shall be arbitrated with Employee and Company as the only parties to the arbitration, and that no Dispute contemplated in this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party. Prior to sub-

[2] The acknowledgment of the handbook does not materially differ for employees outside of California for purposes of this decision.

mitting a Dispute to arbitration, the aggrieved party shall first attempt to resolve the Dispute by notifying the other party in writing of the Dispute. If the other party does not respond to and resolve the Dispute within 10 days of receipt of the written notification, the aggrieved party then may proceed to arbitration. The parties agree that the decision of the arbitrator shall be final and binding. Judgment on any award rendered by an arbitrator may be entered and enforced in any court having jurisdiction thereof.

This Agreement between Employee and Company to arbitrate all employment-related Disputes includes, but is not limited to, all Disputes under or involving Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Fair Credit Act, the Employee Retirement Income Security Act, and all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws, or public policies that regulate, govern, cover, or relate to equal employment, wrongful termination, wages, compensation, work hours, invasion of privacy, false imprisonment, assault, battery, malicious prosecution, defamation, negligence, personal injury, pain and suffering, emotional distress, loss of consortium, breach of fiduciary duty, sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, or interference and/or retaliation involving workers' compensation, family or medical leave, health and safety, harassment, discrimination, or the opposition of harassment or discrimination, and any other employment-related Dispute in tort or contract. This Agreement shall not apply to claims for benefits under unemployment compensation laws or workers' compensation laws.

By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state, or municipal law (including the right to file claims with federal, state; or municipal government agencies). Rather, Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court. Company shall bear the administrative costs and fees assessed by the arbitration provider selected by Employee: either the American Arbitration Association or the Institute for Christian Conciliation. Company shall be solely responsible for paying the arbitrator's fee. Except for those Disputes involving statutory rights under which the applicable statute may provide for an award of costs and attorney's fees, each party to the arbitration shall be solely responsible for its own costs and attorney's fees, if any, relating to any Dispute and/or arbitration. Should any party institute any action in a court of law or equity against the other party with respect to any Dispute required to be arbitrated under this Agreement, the responding party shall be entitled to recover from the initiating party all costs, expenses, and attorney fees incurred to enforce this Agreement and compel arbitration, and all other damages resulting from or incurred as a result of such court action.

Every individual who works for Company must have signed and returned to his/her supervisor this Agreement to be eligible for employment and continued employment with Company. Further, Employee's employment or continued employment will evidence Employee's acceptance of this Agreement. Employee acknowledges and agrees that Company is engaged in transactions involving interstate commerce, that this Agreement evidences a transaction involving commerce, and that this Agreement is subject to the Federal Arbitration Act. If any specific provision of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain binding and enforceable. This Agreement constitutes the entire mutual agreement to arbitrate between Employee and Company and supersedes any and all prior or contemporaneous oral or written agreements or understandings regarding the arbitration of employment-related Disputes. This Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and shall not alter Employee's at-will employment status.

Employee and Company acknowledge that they have read this Mutual Arbitration Agreement, are giving up any right they might have at any point to sue each other, are waiving any right to a jury trial, and are knowingly and voluntarily consenting to all terms and conditions set forth in this Agreement.

(Jt. Exhs. I, J.) The MAA is also part of the application for employment with the Respondent. (Jt. Exhs. K, L.) It has its own signature requirement. The signed MAA is included in each new employee's "new employee packet" and is filed in the employee's personnel file. (Jt. Exhs. M–X.) During the period of December 18, 2010 to December 18, 2014, Respondent hired approximately 65,880 employees and re-hired approximately 6,324 employees for a total of approximately 72,204 recipients of the MAA. (Jt. Mot. ¶ 4(h).)

On December 3, 2013, the Respondent filed a motion in the United States District Court for the Eastern District of California to dismiss individual and representative wage-related claims a former employee had filed against it under California law, in *Ortiz v. Hobby Lobby Stores, Inc*., 2:13-cv-01619-TLN-DAD (E.D. Cal.). (Jt. Exh. Y; Jt. Mot. ¶ 5.) The Respondent moved, in the alternative, pursuant to the Federal Arbitration Act (FAA), to compel individual arbitration of plaintiff's claims under the MAA the plaintiff had signed when she began her employment. (Jt. Exh. Y.)

On April 17, 2014, the Respondent filed a motion seeking to dismiss a putative class action lawsuit filed by multiple employees alleging wage and hour claims against it under California law in *Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVSAN (C.D. Cal.). (Jt. Exh. Z; Jt. Mot. ¶ 5.) In the alternative, pursuant to FAA, the Respondent moved to compel individual arbitration under the MAAs signed by each named plaintiff. (Joint Ex. 2Z.) On June 13, 2014, the U.S. District Court for the Central District of California granted the Respondent's motion to compel individual arbitration under the MAA. *Fardig v. Hobby Lobby Stores Inc*., 2014 WL 2810025 (C.D. Cal. June 13, 2014). The *Fardig* court rejected the plaintiffs' arguments that the MAA was unenforceable under California

law and under the National Labor Relations Act pursuant to the Board's decision in *D. R. Horton, Inc*., 357 NLRB 2277 (2012), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013).

On October 1, 2014, the U.S. District Court for the Eastern District of California in the *Ortiz* case granted the Respondent's motion to compel individual arbitration under the MAA. *Ortiz v. Hobby Lobby Stores, Inc*., 52 F.Supp. 3d 1070 (E.D. Cal. 2015). The court considered the Board's decision in *D. R. Horton*, and concluded its reasoning conflicted with the FAA and the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

III. DECISION AND ANALYSIS

A. The MAA's Prohibition on Class and Collective Legal Claims

Complaint paragraphs 4(a), (c), (d), and 5 allege that, at all material times since at least April 28, 2014, the Respondent has maintained the MAA, which requires employees to waive their right to resolution of employment-related disputes by collective or class action, as a condition of employment, in violation of Section 8(a)(1) of the Act.

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

1. Application of *D. R. Horton* and *Murphy Oil*

When evaluating whether a rule, including a mandatory arbitration agreement, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).[3] See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

Because the MAA explicitly prohibits employees from pursuing employment-related claims on a class or collective basis, I find it violates Section 8(a)(1). The right to pursue concerted legal action, including class complaints, addressing wages, hours, and working conditions falls within Section 7's protections. See, e.g., *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014); *D. R. Horton,* supra;[4] see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)(Section 7 protects employee efforts seeking "to improve working conditions through resort to administrative and judicial forums; *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948–949 (1942); *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under §7 of the National Labor Relations Act."); *Trinity Trucking & Materials Corp. v. NLRB*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), cert. denied, 438 U.S. 914 (1978). Accordingly, an employer rule or policy that interferes with such actions violates Section 8(a)(1). *D. R. Horton,* supra.; *Murphy Oil*, supra; See also *Chesapeake Energy Corp*., 362 NLRB No. 80 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015); *The Neiman Marcus Group, Inc.*, 362 NLRB No. 157 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015); *PJ Cheese Inc.*, 362 NLRB No. 177 (2015); *Leslie's Pool Mart, Inc*., 362 NLRB No. 184 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189 (2015).

The Respondent propounds numerous arguments as to why *D. R. Horton* and its progeny should be overturned.[5] (R Br. 6–48.) I am, however, required to follow Board precedent, unless and until it is overruled by the United States Supreme Court.[6] See *Gas Spring Co*., 296 NLRB 84, 97 (1989) (citing, inter alia, *Insurance Agents International Union*, 119 NLRB 768 (1957), revd. 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960)), enfd. 908 F.2d 966 (4th Cir. 1990), cert. denied 498 U.S. 1084 (1991). Applying the above-cited Board precedent, I find the MAA violates Section 8(a)(1).

Though the Board has made its ruling on the issue clear, I will address the Respondent's arguments that have not been as fully covered by previous decisions. The Respondent contends that a class action waiver does not abridge employees' right to seek class certification to any greater extent than an employer's filing an opposition to an employee's motion for class certification. Of course it does; the former precludes the right, the latter responds to it. And it is apparent the waiver gives the opposition teeth. The Respondent then adds the element of success to the employer's motion to secure its argument. Success of the employer's motion cannot be presumed, however. The Respondent's argument thus fails.

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[3] The Charging Party argues that *Lutheran Heritage* should be overruled. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board.

[4] The Board in *Murphy Oil* reexamined *D. R. Horton*, and determined that its reasoning and results were correct. *Deference and the Federal Arbitration Act*, 128 Harv. L. Rev. 907 (January 12, 2015), provides a well-reasoned explanation as to why the Board's conclusion that collective and class litigation is protected Section 7 activity should be accorded deference by the courts.

[5] Many of these arguments are in line with the dissents in *D. R. Horton* and *Murphy Oil*. Numerous Board and ALJ decisions have addressed the specific arguments raised by the Respondent and there is nothing I can add in this decision that has not already been addressed repeatedly.

[6] The Respondent contends that, because the Board did not petition for a writ of certiorari to challenge the Fifth Circuit's rejection of the relevant part of *D. R Horton*, and because that decision rests primarily on interpretation of a statute other than the NLRA, I should not be constrained by Board precedent. No authority was cited for this contention, however, and I therefore decline to stray from the Board's established caselaw on this point.

The Respondent also contends that the Board's decisions stand for the proposition that employees have the right to have certification decisions heard on their merits. The Board has made no such holding or suggestion. If, by way of the example cited in the Respondent's brief, the class representative misses a filing deadline, nothing in any of the Board's cases suggests a court must nonetheless decide class certification on the merits.

As to the Respondent's assertion that there is no basis in the NLRA, the Federal Rules, or case law for *D .R. Horton's* presumption that class procedures were created to serve any concerns or purposes under the NLRA, the Board has not relied on such concerns or purposes. Two employees who together file charges with the Equal Employment Opportunity Commission (EEOC) about racial harassment are engaged in concerted activity about their working conditions, though the EEOC's charge processing procedures were certainly not created to serve any concerns or purposes under the NLRA. The EEOC's procedures, like class procedures in court, are one of many avenues available for concerted legal activity, regardless of the purposes those procedures were intended to serve.

The Respondent next appears to be arguing that employees can, albeit in vain, file putative class action lawsuits despite the MAA, suffer no adverse consequences for it, and therefore the MAA does not infringe on their rights. There need not be adverse consequences for non-adherence to the MAA for it to violate the Act. Moreover, the MAA on its face spells out adverse consequences for filing putative class actions. The MAA states, in relevant part:

> Should any party institute any action in a court of law or equity against the other party with respect to any Dispute required to be arbitrated under this Agreement, the responding party shall be entitled to recover from the initiating party all costs, expenses, and attorney fees incurred to enforce this Agreement and compel arbitration, and all other damages resulting from or incurred as a result of such court action.

Thus, in addition to breaking an agreement with the employer not to sue as an express condition of continued employment, an employee who files a putative class action may be assessed with fees and damages.

The Respondent also contends that the Board in *D. R. Horton* misinterpreted the *Norris-LaGuardia Act* (NGLA) when determining it prohibits the enforcement of agreements like the FAA. The Board recently reaffirmed its position that the FAA must yield to the NLGA, stating

> The Board has previously explained why "even if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act . . . indicates that the FAA would have to yield insofar as necessary to accommodate Section 7 rights." An arbitration agreement between an individual employee and an employer that completely precludes the employee from engaging in concerted legal activity clearly conflicts with the express federal policy declared in the Norris-LaGuardia Act. That conflict in no way depends on whether the agreement is properly characterized as a condition of employment. By its plain terms, the Norris-LaGuardia Act sweepingly condemns "*[a]ny* undertaking or promise . . . in conflict with the public policy declared" in the statute: insuring that the "individual unorganized worker" is "free from the interference, restraint, or coercion of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection," including "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court of the United States or any state."

On Assignment Staffing Services, supra, slip op. at 10 (Emphasis in original, internal citations and footnotes omitted.)

2. The MAA as an employment contract

The Charging Party also asserts that the FAA does not apply because there is no employment contract, citing to the Supreme Court's decisions in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 113–114 (2001), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006), and *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 277 (1995).[7] The Charging Party points out that the MAA itself states, "[t]his Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and shall not alter Employee's at-will employment status." The employees' at-will status is also set forth in the introductory paragraph of the employee handbook. (Jt. Exh. I p. 5; Jt. Exh. J p. 5.)

The Charging Party notes that the Respondent has not offered evidence or argument that a contract of employment has been created by virtue of the MAA in any of the states where it operates. Resolution of this issue would involve delving into each state's body of contract law.[8] Because it is not required to support my conclusion herein that the MAA violates Section 8(a)(1), I decline to undertake this enormous task, the legal aspects of which none of the parties have addressed in their briefs.

[7] The Charging Party also asserts that MAA, when coupled with the Respondent's confidentiality policy, solicitation policy, loitering policy, email usage policy, computer usage policy, and/or return of company property policy, provide other bases for finding it unlawful. I agree that these policies, when viewed in conjunction with the MAA, act as further barriers to employees discussing their arbitrations under the MAA and/or garnering support from fellow employees. The complaint, however, does not allege that any policy other than the MAA violates the Act, and therefore my conclusions are limited to the MAA. See *Penntech Papers*, 263 NLRB 264, 265 (1982); *Kimtruss Corp*., 305 NLRB 710, 711 (1991).

The Charging Party sets forth numerous other arguments, including the FAA's impact on other federal and state statutes, the rights of workers to organize under the Religious Freedom Restoration Act (RFRA), and the effect of the MAA on union representation. I have considered each argument in the Charging Party's brief. Because this case can be decided by applying the Board precedent discussed above, I do not address all of the Charging Party's arguments.

[8] For example, under Minnesota law, the disclaimer language in the MAA may negate the existence of a contract. See *Kulkay v. Allied Central Stores, Inc*., 398 N.W.2d 573, 578 (Minn.Ct.App.1986). By contrast, in *Circuit City*, the Court of Appeals for the Ninth Circuit determined the dispute resolution agreement at issue, with disclaimer language almost identical to the agreement at issue here, was an "employment contract." *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (1999); See also *Ashbey v. Archstone Property Management, Inc*., 2015 WL 2193178 (9th Cir. 2015).

3. The MAAs and commerce

The Charging Party argues that there is no evidence the individual MAAs with the Respondent's employees affect commerce, and asserts that the activity of arbitration does not affect interstate commerce. This raises the fundamental question of what, in fact, is the "transaction involving commerce" the MAA evidences to bring it within the FAA's reach?

The FAA, at 9 USC § 2, applies to a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . ." Specifically excluded, however, are "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 USC § 1. The Supreme Court in *Circuit City* interpreted this exclusionary provision, "any other class of workers engaged in foreign or interstate commerce," narrowly, and held it applied only to workers actually working in commercial industries similar to seamen and railroad employees. Relying on *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995),[9] the Court in *Circuit City* interpreted Section 2's inclusion provision, a "contract evidencing a transaction involving commerce," broadly, finding it was not limited to transactions similar to maritime transactions.[10] In line with these interpretations, most contracts of employment fall within the FAA's reach, regardless of whether the employees themselves are involved in any traditionally-defined commercial transactions as part of their work.

In *Allied-Bruce Terminix*, supra, the Supreme Court examined the phrase "evidencing a transaction" involving commerce and determined that "the transaction (that the contract 'evidences') must turn out, *in fact* . . . [to] have involved interstate commerce[.]" (emphasis in original). A prior Supreme Court case, *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), that like *Circuit City* and *Allied-Bruce Terminix* interpreted the words "involving commerce" as broadly as the words "affecting commerce,"[11] involved an employment contract between Polygraphic Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of Polygraphic Co.'s Vermont plant. The employment contract at issue contained a provision that in case of any dispute, the parties would submit the matter to arbitration by the American Arbitration Association.

The Supreme Court found the FAA did not apply because the company did not show that the employee, "while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."[12]

[9] The Court in *Allied-Bruce* found that the term "involving" was the same as "affecting" and that the phrase "'affecting commerce' normally signals Congress' intent to exercise its Commerce Clause powers to the full." 513 U.S. at 273–275.

[10] Though I am bound by the majority's decision in *Circuit City*, I find the dissenting opinions, and in particular Justice Souter's explanation of why the Court's "parsimonious construction of § 1 of the . . . FAA . . . is not consistent with its expansive reading of § 2," more sound and compelling. Presumably the result of adherence to precedent, the phrase "contract evidencing a transaction involving commerce" is not seen as a residual phrase following the specific category of maritime transactions in § 2, but the phrase "any other class of workers engaged in foreign or interstate commerce" is seen as a residual phrase following the specific categories of seamen and railroad employees in § 1. This distinction supplied the Court's rationale for applying the maxim *ejusdem generis* to "any other class of workers engaged in foreign or interstate commerce" to support its finding that employment contracts are covered by the FAA. "Maritime transactions" is defined in § 1 by way of listing various transactional contracts, such as charter parties, bills of lading, and agreements relating to supplies and vessels. Applying *ejusdem generis*, the expansive definition given to the phrase "contract evidencing a transaction involving commerce," fails to give independent meaning to the term "maritime transaction."

[11] *Allied-Bruce Terminix*, supra, at 277.

[12] The agreement provided for the employment of Bernhardt as the superintendent of Polygraphic Co.'s lithograph plant in Vermont. Its terms stated:

"Subject to the general supervision and pursuant to the orders, advice and direction of the Employer, Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same or similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer.

"Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952. In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's directions.

"It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer.

"The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or it its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations [section 1448 et seq.]. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere.

"The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action special proceedings or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without

Here, the contract at issue is the MAA.[13] There is no other employment contract implicated in the complaint or the answer.[14] By virtue of the MAA, the employee and employer have transacted an agreement to resolve employment disputes through arbitration. What is analytically more difficult about the MAA and similar agreements, when compared with most contracts, is that the arbitration agreement itself is part of the consideration for the transaction. The agreement here states that the "Mutual Arbitration Agreement . . . is made in consideration for the continued at-will employment of the Employee, the benefits and compensation provided by Company to Employee, and Employee's and Company's mutual agreement to arbitrate as provided in this Agreement."[15] (Jt. Exh. I p. 55; Jt. Exh. J p. 56.) Generally, when a contract is involved, the arbitration agreement is a means to solve a contract dispute, and the terms of the agreement spell out independent consideration. For example, in *Allied-Bruce Terminix*, consideration for the termite bond at issue was money. In *Buckeye Check Cashing*, individuals entered into "various deferred-payment transactions with . . . Buckeye . . . in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge." 546 U.S. at 440. In *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), the arbitration agreement was part of an application to register with the New York Stock Exchange. In none of these cases was the agreement to arbitrate itself consideration in the "contract evidencing a transaction involving commerce."

The MAA's terms, including the "consideration" of the individual arbitral process, are not implicated until there is an employment dispute. In other words, an employment dispute is a condition precedent to performance under the MAA. In typical transactions, a dispute is not necessary for the terms of the agreement to be exercised. For example, in *Buckeye*, the check cashing company provided cash to the individuals as consideration for the individuals signing over their checks and paying a fee. These transactions could play out indefinitely without the arbitration agreement provision ever coming into play. If the individuals in *Buckeye* performed their end of the bargain by turning over their checks and the check cashing company sat idle, a dispute would arise. Conversely, there would be no need for the check cashing company to do anything if the individual never presented it with a check to cash. Not so here, if the employees' work is part of the consideration. At all times prior to the advent of a covered dispute and the invocation of a way to resolve it, the employer is continuing to employ the employee and the employee is continuing to perform work for the employer. Continued employment triggers no duty on the employer or the employee with regard to the MAA.[16] The employee deciding not to continue employment with the Respondent, without more, likewise triggers no duty under the MAA. It is difficult to see, therefore, how continued employment is part of the "transaction" the MAA evidences.

Simply put, the MAA is a contract about how employment disputes will be resolved. The "transactions" evidenced by the MAA are agreements to arbitrate any and all employment disputes. Yes, the MAA is a condition of employment, but its topic is not the work the employees will perform or the conditions under which they will perform it. An employer engaged in interstate commerce could require employees, as a condition of employment, to sign an agreement stating that they will sit with their coworkers for lunchtime on Tuesdays.[17] The topic of this agreement is not the employee's work duties or the employer's business, but rather who the employees will eat lunch with on Tuesdays. It certainly would seem a stretch to find that this agreement would be a "maritime transaction or a contract evidencing a transaction involving commerce."

As noted above, the MAA applies to all employees. As the Charging Party points out, some disputes covered by the MAA with some of these employees would likely affect commerce, and other minor disputes likely would not. Take the example of a security worker who walks a block to work (not across state lines) at the same Hobby Lobby store each day. It is hard to see how an individual arbitration, required by the MAA, about a disagreement over the timing of this security worker's lunch break evidences any transaction involving commerce. The fact that the employer is engaged in interstate commerce does not, in my view, render any individual agreement to arbitrate an employment dispute as a "contract evidencing a transaction involving commerce" because it is not the employer's business of producing and selling goods in interstate commerce comprising the "transaction" evidenced by the MAA. To interpret the FAA this broadly would finally stretch it to its breaking point.[18]

regard to the jurisdiction in which any action or special proceeding may be instituted." 218 F.2d 948, 949–950 (2d Cir. 1955).

[13] I have not been asked to decide whether the entire employee handbook is a contract, and make no findings on this point.

There is no evidence here of any contract setting forth payment, duties, etc. of the various employees' jobs, as in *Bernhardt*. This renders the interpretation in this decision narrower than in *Bernhardt* because I am not looking at a broader employment contract, with an agreement to arbitrate disputes embedded in it, and whether that contract has been breached based on the terms of that contract. Instead, I am looking at whether any employment dispute covered by the contract, here the MAA, evidences a transaction involving commerce.

[14] It strikes me as peculiar that the contract to arbitrate itself is the contract at issue to determine applicability of the FAA, rather than an external contract or agreement subject to an arbitration provision. In most cases, the arbitration agreement would kick in if there was a dispute as to performance under the terms of the agreement. Here, a dispute regarding performance under the terms of the MAA would concern whether the employee submitted a covered dispute to arbitration in line with the MAA, or breached the agreement by filing a lawsuit in court.

[15] Oddly, by this language the MAA is in part made in consideration for itself.

[16] Moreover, as the Respondent asserts, employees who have filed class and/or collective lawsuits have not been disciplined, much less been terminated.

[17] Of course, there would be a clause stating that any disputes over this policy would be subject to arbitration.

[18] Many of the Supreme Court Justices, for example, believe the FAA was stretched too far when the Court determined it applied to state court claims. *Southland Corp. v. Keating*, 465 U.S. 1 (1984), Justice O'Connor, joined by Justice Rehnquist, dissenting; See also *Allied-Bruce Terminex*, supra., Justice O'Connor concurring ; Justice Scalia dissenting; Justice Thomas, joined by Justice Scalia, dissenting. Others

Even if the "transaction" the MAA contemplates is employment or continued employment under the MAA's terms, the individual agreements do not necessarily "evidence a transaction involving commerce." As in *Bernhardt*, not all of the Respondent's employees, while performing their duties, are "'in' commerce, . . . producing goods for commerce, or . . . engaging in activity that affect[s] commerce . . . ."

Consideration of the Supreme Court's decision in *Citizens Bank v. Alafabco, Inc*., 539 U.S. 52 (2003), does not lead to a different finding. In *Citizen's Bank*, the Court stated, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" 539 U.S. at 56–57, quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co*., 334 U.S. 219, 236, (1948). Citizens Bank and Alafabco, a fabrication and construction company, entered into debt-restructuring agreements that contained an agreement to arbitrate any disputes. The Court rejected the argument that the individual transactions underlying the agreements did not, taken alone, have a "substantial effect on interstate commerce." Id. at 56. First, the Court found that Alafabco engaged in interstate commerce using loans from Citizens Bank that were renegotiated and redocumented in the debt-restructuring agreements. Second, the loans at issue were secured by goods assembled out-of-state. Finally, the Court relied upon the "broad impact of commercial lending on the national economy [and] Congress' power to regulate that activity pursuant to the Commerce Clause." The arbitration agreements between the Respondent and the individual employees in this case do not fall within any of these rationales.

The Charging Party, pointing out that the FAA derives its authority from the Commerce Clause, cites to *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012). *Sebelius* discusses the Commerce Clause in relation to Affordable Healthcare Act's (ACA) provision requiring individuals to buy health insurance, commonly known as the individual mandate. In describing the reach of the Commerce Clause in *Sebelius*, the Court observed, "Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'" The Court determined that the "activity" at issue with regard to the individual mandate was the purchase of healthcare insurance, and that under the Commerce Clause, Congress was not empowered to regulate the failure to engage in this activity. Under this analysis, the "activity" the MAA concerns is resolution of employment disputes. For the reasons described above, this "activity" does not necessarily affect interstate commerce, particularly in cases where no dispute with regard to employment under the MAA ever arises.

Based on the foregoing, I agree with the Charging Party that the Respondent has made no showing that an arbitration agreement between the Respondent and any of its individual employees affects commerce.[19]

4. Team truckdrivers

The Charging Party further argues that team truck drivers who transport the Respondent's products across state lines are a class of workers engaged in interstate commerce, and therefore fall within FAA's exception at 9 U.S.C. § 1. The Court in *Circuit City* held that "Section 1 exempts from the FAA only contracts of employment of transportation workers." The interstate truck drivers are clearly transportation workers, a fact not disputed by the Respondent, and therefore are exempt from the FAA. Requiring the team truck drivers to sign and adhere to the MAA therefore violates the Act, regardless of the Board's decisions in *D. R. Horton* and related cases.

B. Enforcement of the MAA

Complaint paragraphs 4(e) and 5 allege that the Respondent violated Section 8(a)(1) of the Act by enforcing the MAA, as detailed above.

It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights. See, e.g., *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 16–17 (1962); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945).

Here, it is undisputed that the Respondent enforced the MAA by filing motions to compel individual arbitration in *Fardig* and *Ortiz*, as detailed above. (Jt. Exhs. Y, Z). The Respondent contends that the Board lacks authority to enjoin the Respondent's motions to compel because they are protected by the First Amendment under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983), and *BE&K Construction CO. v. NLRB*, 536 U.S. 516 (2002). I find that instant case falls within the exception set forth in Bill Johnson's at footnote 5, which states in relevant part:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, see *Granite State Joint Board, Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), rev'd, 409 U.S. 213, 93 S.Ct. 385, 34 L.Ed.2d 422 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), enforced

believe it was stretched too far when it was held to apply to employment contracts. *Circuit City,* supra, Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, dissenting; Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissenting.

[19] As the party asserting the FAA as an affirmative defense, the Respondent has the burden of proof to show that the agreements at issue are subject to the FAA. The assertion of the FAA as an affirmative defense requires me to address its reach in this decision. Though, as the Respondent notes, many courts have disagreed with the Board's rationale in *D. R. Horton*, et. al., the precise issue of whether a particular agreement to arbitrate is a "maritime transaction or a contract evidencing a transaction involving commerce" has not been squarely addressed.

> in relevant part, 148 U.S.App.D.C. 119, 459 F.2d 1143 (1972), aff'd, 412 U.S. 84, 93 S.Ct. 1961, 36 L.Ed.2d 764 (1973), and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power preempts the field." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).

The Board has determined that these exceptions apply in the wake of *Bill Johnson's* and *BE&K Construction*. See, e.g., *Allied Trades Council (Duane Reade Inc.)*, 342 NLRB 1010, 1013, fn. 4 (2004); *Teamsters, Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991). Moreover, particular litigation tactics may fall within the exception even if the entire lawsuit may not be enjoined. *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); *Dilling Mechanical Contractors*, 357 NLRB 544 (2011). As such, since the Board has concluded that agreements such as those comprising the MAA explicitly restrict Section 7 activity, the Respondent's attempt to enforce the MAA in state court by moving to compel arbitration fall within the unlawful objective exception in *Bill Johnson's*. See *Neiman Marcus Group*, supra.

The Respondent argues that numerous courts have found agreements such as the MAA to be lawful and enforceable. While this is true, the Board has held that agreements such as the MAA violate the Act, and the Supreme Court has not ruled otherwise. The Respondent, by its actions in court, is challenging Board case law which very clearly holds the MAA violates the Act. The motion to compel arbitration, which by virtue of the MAA can only be on an individual basis, is the crux of the challenge. Inherent in this challenge are risks, which the Respondent is assuming by declining to follow the Board's case law as it works its way through the system.

C. The MAA and Board Charges

Complaint paragraphs 4(b) and 5 allege that the Respondent violated Section 8(a)(1) by maintaining, at all material times since at least April 28, 2014, which would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board.

The *Lutheran Heritage* test set forth above applies to this allegation. I find that employees would reasonably construe the MAA as restricting their access to file charges with the Board.

The MAA is worded very broadly, and explicitly states it applies to "any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as "Dispute") that Employee may have" at any time that that "in any way arises out of, involves, or relates to Employee's employment" with the Respondent. This would certainly encompass an unfair labor practice charge with the Board.

More specifically, the MAA includes disputes involving:

> wrongful termination, wages, compensation, work hours, . . . sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, and all Disputes involving interference and/or retaliation relating to workers' compensation, family or medical leave, health and safety, harassment, discrimination, and/or the opposition of harassment or discrimination, and/or any other employment-related Dispute.

Certainly, disputes about wrongful termination, wages, compensation, and hours could comprise unfair labor practice claims. Discrimination based on Section 7 activity also is encompassed by this language.

The MAA then proceeds to state it applies to disputes under various federal laws, ending with a catchall that it applies to disputes under :

> all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws, or public policies that regulate, govern, cover, or relate to equal employment, wrongful termination, wages, compensation, work hours, invasion of privacy, false imprisonment, assault, battery, malicious prosecution, defamation, negligence, personal injury, pain and suffering, emotional distress, loss of consortium, breach of fiduciary duty, sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, or interference and/or retaliation involving workers' compensation, family or medical leave, health and safety, harassment, discrimination, or the opposition of harassment or discrimination, and any other employment-related Dispute in tort or contract.

That this would encompass some claims under the NLRA requires no explanation. The only claims explicitly excluded are benefits under unemployment compensation laws or workers' compensation laws.

The Respondent contends that the MAA would not be interpreted to apply to Board charges because of the following language:

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (including the right to file claims with federal, state or municipal government agencies).

The Respondent contends that because of the explicit statement that claims with federal, state, or municipal agencies are excluded from the MAA, any misinterpretation of the MAA would be manifestly unreasonable. I disagree.

To begin with, the MAA specifically states claims of sexual harassment, harassment and/or discrimination based on any class protected by federal law are subject to mandatory individual arbitration. These are all patently clear examples of claims that arise under the civil rights statutes the Equal Employment Opportunity Commission (EEOC) enforces, i.e., Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.[20] Yet the MAA also states that nothing would preclude an employee from filing a charge with a federal agency, ostensibly including the EEOC.[21] The only way to reconcile these two provisions is to read the MAA as not precluding filing a charge with an ad-

[20] These statutes are respectively codified at 42 U.S.C. 2000e et seq.; 42 U.S.C. 121-1 et seq; and 20 U.S.C. 633a.

[21] The EEOC's charge-filing process is described at http://eeoc.gov/employees/howtofile.cfm.

ministrative agency, yet in the end those disputes must be resolved only through final and binding arbitration under the MAA rather than through whatever fruits filing a charge or other similar effort may bear. The same rationale holds true for Board proceedings, given that the MAA requires individual arbitration of disputes over "wrongful termination, wages, compensation, work hours." This begs the question: Why would any employee bother to file a charge? A reasonable employee, not versed in how various federal, state, and local agencies process claims, would take it at face value that the topics specifically included as falling within the MAA would be subject to arbitration. This is particularly true given that the MAA explicitly excludes benefits under unemployment compensation laws or workers' compensation laws, but not under the NLRA.

Considering that ambiguities must be construed against the drafter of the MAA, which is the Respondent, I find the MAA violates Section 8(a)(1) because employees would reasonably believe the MAA requires arbitration of employment-related claims covered by the Act. See *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).

CONCLUSIONS OF LAW

(1) The Respondent, Hobby Lobby Stores, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement (MAA) requiring all employment-related disputes to be submitted to individual binding arbitration.

(3) The Respondent violated Section 8(a)(1) of the Act when it enforced the MAA by asserting the MAA in litigation the Charging Party brought against the Respondent.

(4) The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the MAA is unlawful, the recommended order requires that the Respondent revise or rescind it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board. The Respondent shall notify all current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement. Because the Respondent utilized the MAA on a corporatewide basis, the Respondent shall post a notice at all locations where the MAA, or any portion of it requiring all employment-related disputes to be submitted to individual binding arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D. R. Horton,* supra, slip op. at 17; *Murphy Oil*, supra.

I recommend the Respondent be required to notify the U.S. District Court for the Eastern District of California in *Ortiz v. Hobby Lobby Stores, Inc.,* 2:13-cv-01619-TLN-DAD (E.D. Cal.), and the U.S. District Court for the Central District of *California in Fardig v. Hobby Lobby Stores, Inc*., 8:14-cv-00561-JVSAN (C.D. Cal.), that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to dismiss these actions and to compel individual arbitration of the claims, and inform the court that it no longer opposes the actions on the basis of the arbitration agreement.

I recommend the Company be required to reimburse employees for any litigation and related expenses, with interest, to date and in the future, directly related to the Company's filing its motion to compel arbitrations in *Ortiz v. Hobby Lobby Stores, Inc*., 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVSAN (C.D. Cal.). Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987), (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to the employees shall be computed on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Hobby Lobby Stores, Inc., Oklahoma City, Oklahoma, with a place of business in Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign the mandatory arbitration agreement in any form

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the U.S. District Court for the Eastern District of California in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and the U.S. District Court for the Central District of California in *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), that it has rescinded or revised the mandatory arbitration agreement upon which it based its motions to dismiss the class and collective actions and to compel individual arbitration of the employees' claim, and inform the respective courts that it no longer opposes the actions on the basis of the arbitration agreement.

(d) In the manner set forth in this decision, reimburse the plaintiffs who filed suit in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing the Respondent's motion to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at all facilities in California the attached notice marked "Appendix A," and at all other facilities employing covered employees, copies of the attached notice marked "Appendix B."[23] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 8, 2015

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, we will provide them a copy of the revised agreement.

WE WILL notify the courts in which the employees filed their claims in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), that we have rescinded or revised the mandatory arbitration agreement upon which we based our motion to dismiss her collective wage claim and compel individual arbitration, and we will inform the court that we no longer oppose the employees' claims on the basis of that agreement.

WE WILL reimburse the plaintiffs in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to dismiss her collective wage claim and compel individual arbitration.

HOBBY LOBBY STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20–CA–139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, we will provide them a copy of the revised agreement.

HOBBY LOBBY STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20–CA–139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

CIRCUIT RULE 30(d) CERTIFICATION

I certify that all of the materials required by Circuit Rules 30(a) and 30(b) are respectively included in the Appendix bound with this brief and the Joint Appendix Volumes 1 and 2 of Hobby Lobby Stores, Inc. and the Committee to Preserve the Religious Right to Organize.

s/Ron Chapman, Jr.

CERTIFICATE OF SERVICE

I certify that on this 20th day of December, 2016, I caused this BRIEF FOR APPELLANT. to be filed electronically with the Clerk of the Court using the CM/ECF System, thereby serving:

Ms. Valerie L. Collins, Attorney

Ms. Linda Dreeben, Attorney

Joseph F. Frankl, Attorney

Ms. Elizabeth A. Heaney, Attorney

Yasmin Macariola, Attorney

David A. Rosenfeld, Attorney

s/Ron Chapman, Jr.

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(g), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(c) because this Brief contains 13,989 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using Century Schoolbook 14-point font, a proportionately spaced typeface.

Dated this 20th day of December, 2016.

s/Ron Chapman, Jr.

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